

In the Matter of:)
)
 Rulemaking to Modify Rules of) Docket 02-SIT-1
 Practice and Procedure for)
 Powerplant Applications)
)
 Energy and Infrastructure and)
 Licensing Committee Workshop)
 to Discuss Possible Amendments))
 to the Regulations)
)

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CEC COMMISSIONERS AND ADVISORS PRESENT

Robert A. Laurie, Commissioner and Presiding
Member

Robert Pernell, Commissioner and Associate Member

Scott Tomashefsky, Advisor to Commissioner Laurie

CEC STAFF PRESENT

Richard Buell, CEC Staff

Lisa DeCarlo, Staff Counsel

Arlene Ichien, Assistant Chief Counsel

Chris Tooker, CEC Staff

PUBLIC ADVISER

Grace Bos, Associate Public Adviser

MEMBERS OF THE PUBLIC

Steven Kelly, Policy Director, Independent Energy
Producers

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Michael Monagan, Politico Group, representing
Calpine

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P R O C E E D I N G S

9:00 a.m.

PRESIDING COMMISSIONER LAURIE: Good morning. This is a hearing on possible amendments to the Energy Commission siting regulations.

There are two separate proposals. I will call on Mr. Buell to summarize those, and then we will seek public input. Your public input is urgently solicited on the issues.

Mr. Buell, do you care to summarize at this point, please.

CEC STAFF BUELL: Yes. Let me begin by indicating that we had initiated this OIR process, ordinance in rulemaking, back in February of this year. The purpose of today's workshop is to solicit comments, as the Commissioner has indicated.

We are looking at modifying two sections or two aspects of our siting regulations. Those are sections 1230 and subsequent sections related to the complaint and investigation process.

For complaints the investigation staff is looking at establishing an informal process by which a complainant might ask the staff to conduct an investigation of alleged noncompliance or other

1 issues. Based upon the results of that
2 investigation, staff will prepare a report to --
3 they will identify its findings. It would clarify
4 how it's interpreting its siting regulations or
5 how it's interpreting a proposed decision.

6 That would either hopefully resolve the
7 complaint at that point in time. And if not, if
8 the complainant isn't satisfied, we'd move on to a
9 formal process by which a complainant could
10 request the Commission's full consideration of
11 their alleged noncompliance or other issue.

12 PRESIDING COMMISSIONER LAURIE: Now, as
13 I understand the rule today, Ms. X files a
14 complaint alleging noncompliance. We have to by
15 regulation hold a formal hearing; is that right?

16 CEC STAFF BUELL: That's right, and
17 that's the reason why we're proposing this change
18 is that the regulations currently require the
19 Commission to conduct hearings on an issue without
20 any establishment of any validity of the
21 complaint, or any background information or
22 investigation being conducted.

23 And so we view this as being a method of
24 trying to expedite the resolution of complaints
25 and streamlining the process.

1 PRESIDING COMMISSIONER LAURIE: Thank
2 you. Anything else on that particular item?

3 CEC STAFF BUELL: No. That was a brief
4 summary.

5 PRESIDING COMMISSIONER LAURIE: Well,
6 let's go ahead and summarize the next item, and
7 then we'll take input back on the first.

8 CEC STAFF BUELL: Okay. The next
9 section of the regulations --

10 PRESIDING COMMISSIONER LAURIE: Let me
11 interrupt. Let the record reflect that
12 Commissioner Pernell has joined us.

13 Thank you. Go ahead.

14 CEC STAFF BUELL: The next section of
15 the regulations that we're looking at is 1720.3,
16 and this deals with the construction deadlines.
17 Let me start off by kind of explaining why we're
18 looking at a change in this section of the
19 regulations.

20 The existing regulations allow for a
21 license to be valid or construction to start up to
22 five years after a license has been issued.

23 PRESIDING COMMISSIONER LAURIE: When was
24 that regulation initiated? Was that an original
25 regulation do you think back in the mid-'70s?

1 CEC STAFF BUELL: It was adopted, if I'm
2 not mistaken and Lisa can correct me, in the mid-
3 '80s.

4 PRESIDING COMMISSIONER LAURIE: All
5 right.

6 CEC STAFF BUELL: So it's been around
7 for some time.

8 The five-year requirement is
9 inconsistent with other land use designations that
10 have a time limit on them. I believe the
11 Subdivision Map Act has either a two-year or 18-
12 month moratorium on its validity. Air districts,
13 for example, use a two-year. Their authorities to
14 construct have a two-year life. At that time the
15 air district can go back and review the authority
16 construct and evaluate whether changes should be
17 made or they can reissue the authority to
18 construct.

19 PRESIDING COMMISSIONER LAURIE: And so
20 in that two-year time period, it is relevant in
21 our process; is it not?

22 CEC STAFF BUELL: Right.

23 PRESIDING COMMISSIONER LAURIE: So even
24 though we grant the license for five years, the
25 authority to construct issued by the air district

1 is only good for two years.

2 CEC STAFF BUELL: That's correct.

3 PRESIDING COMMISSIONER LAURIE: And so
4 what happens at the end of that two-year time
5 period, do you know?

6 CEC STAFF BUELL: Well, when it does
7 come up, the district could hold hearings of its
8 own to consider changing the authority to
9 construct. It would require the Commission to go
10 back and amend its decision if they make any
11 changes.

12 There are some hearings that would need
13 to take place by the Commission to consider
14 this --

15 PRESIDING COMMISSIONER LAURIE: We've
16 never had that happen yet, correct?

17 CEC STAFF BUELL: As far as I know, that
18 has not happened.

19 PRESIDING COMMISSIONER LAURIE:
20 Mr. Tooker, have you ever heard of that? Not
21 heard of the rule, but have we ever had to deal
22 with that before?

23 CEC STAFF TOOKER: My only knowledge is
24 that we had a request for an extension of a
25 license beyond five years, and in that case one of

1 the stipulations was if that were to occur, they
2 would have to renew the air permit to update it,
3 consistent with the requirements at that time.

4 PRESIDING COMMISSIONER LAURIE: Okay,
5 thank you.

6 CEC STAFF BUELL: So that's kind of one
7 of the reasons why we're considering that we need
8 to make our regulations consistent with other
9 local governmental regulations. Another concern
10 of the Commission is, of course, that a number of
11 applicants have delayed their filing, or beginning
12 construction of their projects, and we wanted to
13 have some trigger that would cause us to consider
14 the status of those delays and projects.

15 The regulations that we're proposing
16 would do a number of things. They would change
17 the five years to two years, so that the applicant
18 would be required to start construction in two
19 years. If he wanted to, he could request an
20 extension for another year. If he made that
21 request, he would need to provide additional
22 information on why he couldn't meet the initial
23 two-year window, how he intended to make -- start
24 construction and be on line if the extension was
25 granted. Also, to provide background information

1 on what rules and regulations had changed since
2 the initial application had been granted, and also
3 what environmental as well as system effects had
4 changed since the initial application had been
5 granted.

6 The Commission, the rules and
7 regulations as modified would allow the Commission
8 to modify the conditions of certification if the
9 Commission found it appropriate to do so. We're
10 also proposing to add a deadline for the
11 commencement of operation which would be two years
12 after the commencement of construction.

13 PRESIDING COMMISSIONER LAURIE: Okay.
14 Let's look at that for a moment. That's
15 subsection C.

16 CEC STAFF BUELL: That's correct.

17 PRESIDING COMMISSIONER LAURIE: And the
18 sentence reads, "Prior to the deadline," meaning
19 two years after the pouring of concrete --

20 CEC STAFF BUELL: Yes.

21 PRESIDING COMMISSIONER LAURIE: -- "the
22 project owner may request and the Commission may
23 order an extension." Is it the intent as written
24 that the request include the same information as
25 A(1) through (4) above, and if an extension is

1 granted that conditions may be attached as set
2 forth in subsection B above, because that is not
3 clear.

4 So what do you think the intent of that
5 is?

6 CEC STAFF BUELL: As of this moment, the
7 regulations would not require the level of
8 information as for an extension of construction.
9 And I'm not sure that we necessarily would want to
10 dig into those issues. I think that this deadline
11 would more than likely be missed by a month or so,
12 and I don't know that the Commission necessarily
13 would want to reconsider a decision at that point
14 in time.

15 We could modify this portion of the
16 regulations to be consistent with part, I believe
17 it's part A.

18 PRESIDING COMMISSIONER LAURIE:
19 Question: What happens if the deadline set under
20 either sections A or C are not met and no
21 extension is granted?

22 CEC STAFF BUELL: By implication, the
23 license would be revoked.

24 PRESIDING COMMISSIONER LAURIE: Okay.

25 Ms. DeCarlo, from a legal perspective,

1 are you satisfied that the language under 1720.3
2 is sufficiently clear so that it is understood
3 what the ramifications of not meeting the deadline
4 are, or if you were to enforce this provision,
5 would you need an additional provision setting
6 forth what the enforcement remedies are, if any?

7 STAFF COUNSEL DE CARLO: No, I believe
8 it's sufficiently clear as written. It actually
9 goes into a little more detail than the current
10 construction deadline that we currently have.

11 PRESIDING COMMISSIONER LAURIE: Okay,
12 thank you.

13 Anything else, Mr. Buell?

14 CEC STAFF BUELL: No, that summarizes
15 it.

16 PRESIDING COMMISSIONER LAURIE: And
17 Commissioner Pernell?

18 ASSOCIATE COMMISSIONER PERNELL: Thank
19 you, Commissioner Laurie. I apologize for being
20 late.

21 A couple of questions. Staff
22 recommendation is two years after the
23 certification --

24 CEC STAFF BUELL: Yes.

25 ASSOCIATE COMMISSIONER PERNELL: -- that

1 the construction should start, and your definition
2 of that is installation of foundations and major,
3 foundations or major project structures.

4 CEC STAFF BUELL: Yes.

5 ASSOCIATE COMMISSIONER PERNELL: I'm
6 trying to think through exactly what that means.
7 Does that mean on all of the foundations for the
8 footprint? Does that mean going out and pouring,
9 you know, a part of the foundation and then
10 sitting on it for another two years? So I would
11 want to have a different definition for what
12 commencing construction means.

13 CEC STAFF BUELL: Yes, and we have
14 discussed internally amongst ourselves different
15 types of definitions that would make this clear.
16 One of the things that recently has come to our
17 attention are the contracts with DWR that have a
18 more elaborate definition that define construction
19 as not only the pouring of foundations, but also
20 having a lot of construction workers on site doing
21 work, and that there is actual progress to
22 actually building the facility.

23 And that's one thing that we may look
24 at, and our staff may recommend that the siting
25 committee look at in terms of drafting regulations

1 is a more elaborate -- I don't know if that's the
2 right word -- a more definitive definition for
3 commencement of construction appropriate for their
4 consideration. And we would advise them to look
5 at those contracts as one example of what might be
6 appropriate.

7 PRESIDING COMMISSIONER LAURIE:

8 Actually, there is some precedence for using
9 installation of concrete in case law where the
10 question is posed, does one have a vested right
11 under a given permit. The mere holding of an
12 entitlement does not necessarily establish a
13 vested right. You need something in addition to
14 that. And I believe, at least the last time I
15 looked at it when I was still pretending I was a
16 lawyer, that line was set at the pouring of a
17 foundation, generally speaking.

18 Any thoughts on that, Ms. De Carlo? Is
19 that anything close to consistent with what your
20 understanding is?

21 STAFF COUNSEL DE CARLO: I'm sorry, I
22 don't have very much experience with case law in
23 that area, but our intention for designating the
24 installation of concrete foundations as a trigger
25 point for commencement of construction was we felt

1 it reflected a financial investment in the
2 project, the establishment of financing, solid
3 financing for the project, and a kind of point at
4 which they wouldn't go back.

5 PRESIDING COMMISSIONER LAURIE: That's
6 how courts have, at least in the past, interpreted
7 it.

8 ASSOCIATE COMMISSIONER PERNELL: My
9 interpretation of a financial investment is just
10 getting through our process.

11 (Laughter.)

12 ASSOCIATE COMMISSIONER PERNELL: I guess
13 my thought here is, and then I have some other
14 questions, but on this issue, do you have a copy
15 of the language that you were referring to?

16 CEC STAFF BUELL: Yes, I do, as a matter
17 of fact. I believe that these terms and
18 conditions are on the DWR's web site also, and
19 what specifically can I help you with?

20 ASSOCIATE COMMISSIONER PERNELL: Well,
21 do you care to share those, or is that something
22 we can do? I'm just --

23 CEC STAFF BUELL: Well, let me try -- Do
24 you want to read this or do you want me to read
25 it?

1 STAFF COUNSEL DE CARLO: Oh, I can do it
2 if you'd like.

3 CEC STAFF BUELL: It defines to commence
4 construction means, a) actively to commence site
5 excavation; b) to make a significant commitment of
6 resources designed to achieve construction and
7 commercial operation of the project by the date
8 set forth in special condition four, including
9 without limitation the execution of sufficient
10 contracts for necessary materials and supply; and
11 c) to cause sustained activity to occur on a daily
12 basis at a project site with full crews that is
13 designed to achieve construction and commercial
14 operation of the project by the date set forth in
15 special condition four.

16 It also has a definition for the
17 achievement of commercial operation, and I can
18 read that if you'd like. To achieve commercial
19 operation of a project means that such project has
20 been completed, has passed all material and
21 performance tests, the seller or owner of the
22 project has all necessary permits to operate the
23 project at the output level for which it was
24 designed; the project is capable of operating on a
25 sustained basis at substantial output level for

1 which it has been designed; and all
2 interconnections and capacity ratings of the
3 interconnection facilities, the interconnection
4 agreement, and transmission connections are
5 sufficient for delivery of full output of the
6 project to the ISO-controlled grid.

7 ASSOCIATE COMMISSIONER PERNELL: Okay.
8 Well, that part -- just the commence construction
9 part goes a little bit further than just pouring
10 foundations.

11 CEC STAFF BUELL: That's correct.

12 ASSOCIATE COMMISSIONER PERNELL: It
13 talks about --

14 CEC STAFF BUELL: I would say that --

15 ASSOCIATE COMMISSIONER PERNELL: --
16 supplies and employees and certain activities to
17 occur on a daily basis, I guess.

18 CEC STAFF BUELL: I think that in both
19 cases what is trying to be measured is some
20 financial commitment upon the project owner's part
21 is being made. The point of foundations is one
22 measure of that. The contracts have a far more
23 specific nature to them in defining different
24 steps or different commitments that also have a
25 financial commitment to the project.

1 In either case, I think that's what --
2 the measure that we're trying to --

3 ASSOCIATE COMMISSIONER PERNELL: Right.
4 I guess the question is the level of commitment,
5 of financial commitment that we will use to define
6 what commencing construction means.

7 Let me turn to your recommendation in
8 terms of the length of time after -- Right now we
9 have a five-year, and that's a five-year time
10 schedule to have the project up and running --

11 CEC STAFF BUELL: No.

12 ASSOCIATE COMMISSIONER PERNELL: -- or
13 to commence construction?

14 CEC STAFF BUELL: Yes.

15 ASSOCIATE COMMISSIONER PERNELL: In your
16 proposal, basically we have four years. You got
17 two years after the certificate and two years to
18 commence commercial operation.

19 CEC STAFF BUELL: That's correct.

20 ASSOCIATE COMMISSIONER PERNELL: All
21 right. So I guess my question is, are we doing
22 ourselves any justice by going through this
23 process if we're only shaving one year off?

24 CEC STAFF BUELL: Well, we're shaving
25 actually more than one year off in that the

1 existing regulations have a five-year deadline for
2 the commencement of construction. If you added
3 the normal construction time of two years beyond
4 that, it would be seven years. So, as you pointed
5 out, our regulations provide a four-year window to
6 bring a project on line or operational. We're
7 changing it from seven to four, so that's a three-
8 year reduction, more than one year.

9 ASSOCIATE COMMISSIONER PERNELL: And
10 there's nothing in here that talks about the size
11 of the project. In other words, a peaker would
12 have the same amount of time as a major 15-
13 megawatt base plant.

14 CEC STAFF BUELL: That's correct.

15 ASSOCIATE COMMISSIONER PERNELL: And you
16 can probably put a peaker up in from four to six
17 months, whereas it will take maybe 18 months to do
18 an 18-to-24, to do a base plant.

19 CEC STAFF BUELL: That's correct, and
20 that's the problem with writing regulations is to
21 write them general enough to be understood for all
22 parties, make it a level playing field, yet there
23 are nuances that different types of facilities
24 will be -- can be constructed quicker.

25 Some facilities may be more critical to

1 bringing on line on the date certain, because of
2 their need for system reliability.

3 ASSOCIATE COMMISSIONER PERNELL: Okay,
4 and I understand that, and we can't be so specific
5 when we're doing this.

6 I guess my next question goes to the
7 commencing of construction, and I'm kind of stuck
8 on this one. Because if we give a license,
9 normally, and this is just my own opinion, but I
10 would think a company that goes through our
11 process and finds themselves on the other end,
12 with the amount of investment they've done that
13 they would want to start construction as soon as
14 possible.

15 So giving them -- And I would also
16 assume that if it's a -- let's just say it's an
17 800-megawatt plant -- that certain investors would
18 be lined up ahead of time. And most of the time
19 what those investors are doing is ensuring that
20 the level of risk is not so great, so when we give
21 them the certification or license, then that level
22 of risk of the regulatory element goes away, then
23 it's just a matter of building.

24 And I also understand that it doesn't
25 take two years to secure financing in one of these

1 situations. So I'm wondering whether or not the
2 two years is too long.

3 CEC STAFF BUELL: I believe we have a
4 couple of representatives from the industry here,
5 and I'll let them speak to exactly how they
6 obtained funding.

7 ASSOCIATE COMMISSIONER PERNELL: Well,
8 they're going to want seven, I'm just --

9 CEC STAFF BUELL: Our rationale for two
10 years is, how it began was to make it consistent
11 with other local permits. And that's the primary
12 reason for selecting two years.

13 ASSOCIATE COMMISSIONER PERNELL: So it
14 has nothing to do with whether they can get
15 financing or anything else, other than being
16 consistent with existing regulatory rules with
17 other agencies?

18 CEC STAFF BUELL: I had done some
19 looking at what the historical pattern had been,
20 and normally what we see is the commencement of
21 construction has been on the average about a year
22 after a project has been licensed. And although
23 an applicant most likely has worked with the
24 financial community to get things on line prior to
25 certification, it's been my understanding from

1 discussions with applicants that they don't
2 actually secure financial backing of the project
3 until after our certification has been granted.

4 ASSOCIATE COMMISSIONER PERNELL: Right,
5 but it doesn't take two years to do that,
6 according to some bond counseling folks that I've
7 talked to.

8 CEC STAFF BUELL: It does in some cases,
9 it doesn't in others I believe is what the answer
10 to that question is. Some projects have failed,
11 having been given a license to secure financing
12 for the project.

13 ASSOCIATE COMMISSIONER PERNELL: Right,
14 but that's not -- I mean, I would state that
15 that's because of their creditworthiness that they
16 failed to get financing, not necessarily have
17 anything to do with the construction of the
18 project. But that's just my opinion.

19 CEC STAFF BUELL: It has to do with a
20 number of factors, and we could speculate here on
21 what those are.

22 ASSOCIATE COMMISSIONER PERNELL: If
23 you've got a triple A credit rating, you're going
24 to get financing.

25 CEC STAFF BUELL: Provided you can

1 demonstrate to the lender that you've got a viable
2 project. I don't think that anyone is going to
3 grant financing for a \$300-million project if they
4 don't believe that they can get a rate of return
5 that's acceptable to the lending institution,
6 regardless of the credit rating of the builder.

7 ASSOCIATE COMMISSIONER PERNELL: Well, I
8 would agree with that, but I would also counter
9 that with I don't think that an applicant would go
10 through our process if they didn't think they had
11 a project that would give them a rate of return
12 that would make it worth their while to even get
13 into this.

14 And I think what we're trying to get to
15 is that, at least in my experience, these
16 applicants have been serious when they go through
17 our project. And the thing that holds up their
18 financing, if you're going to the bond market, is
19 how certain that license is. And if we do the job
20 that we've been doing in the past, which means
21 that it's hard to challenge our license, then the
22 level of risk goes away once they get the
23 certificate.

24 PRESIDING COMMISSIONER LAURIE: I think
25 Chris has something to add.

1 ASSOCIATE COMMISSIONER PERNELL: And I'm
2 not arguing with you, I'm just stating a whole
3 bunch of research facts that I've been able to do
4 before this hearing.

5 CEC STAFF TOOKER: Let me make a few
6 points. One of the things that we have seen in
7 the current market or since deregulation of the
8 industry is we have applicants who go through the
9 licensing process with every intention of selling
10 their license once they obtain it. And so they
11 don't plan to go immediately to construction, and
12 that has happened in at least a few circumstances.

13 The other thing is we've obviously seen
14 recently that as market conditions and projections
15 change, that changes the decisions of applicants
16 regarding the financing options that they have and
17 that they want to pursue and the timing of
18 construction. So I think we recognize there needs
19 to be a little flexibility given for those
20 circumstances that we didn't necessarily see in a
21 regulated industry, when utilities had long-range
22 plans, and a lot more certainty in the scheduling
23 of projects.

24 ASSOCIATE COMMISSIONER PERNELL: Yeah,
25 and, you know, well, I've got to tell you, I'm not

1 as sympathetic to someone who wants to go through
2 this process and then sell their license. That's
3 not what we're -- We're about getting people
4 through the process that will do something to add
5 to the state of California's energy supply. So,
6 in terms of going through this process to find a
7 buyer to sell to, I'm not that sympathetic to.

8 But I am sympathetic to the market, and
9 I would think that the longer we delay the
10 project, the more risks that the applicant and us,
11 in terms of getting more generation, will face in
12 the market, because the market is always
13 fluctuating up and down, depending upon a number
14 of factors.

15 So if we consider some flexibility
16 because of the market, I think that's, you know,
17 obviously I think five years is too long. And I
18 don't know that two years is sufficient, because
19 of the fluctuation in the market. So an applicant
20 might find themselves with a license, ready to go,
21 and because they have two years they wait a while,
22 and then the market drops and now they're probably
23 not going to build or stuck with a license they
24 can't sell, so I think that adds to the element of
25 risk, the length of time.

1 CEC STAFF BUELL: My only response to
2 that is that I don't think we want to add to the
3 uncertainty by limiting it, necessarily, to one
4 year and making the viability of a project less
5 certain. So there is a balance to be add on what
6 target we used for the start of construction.

7 As I had indicated earlier, I think the
8 average has been around a year, and there have
9 been a number of reasons why that's been the case.
10 In some cases it's simply that they haven't had
11 financial backing of the project or haven't lined
12 it all up, and in some cases it may be that they
13 haven't lined up all the labor that's necessary
14 for a project, or they haven't lined up the
15 equipment that needs to be delivered on site.

16 So there are a number of reasons why an
17 applicant may find itself in a situation that it
18 can't commence construction within one year of the
19 license being granted, and I would be concerned
20 about a limitation that would potentially cause
21 the Commission to conduct a review unnecessarily
22 for something that was a force majeure action that
23 the applicant couldn't avoid the situation.

24 ASSOCIATE COMMISSIONER PERNELL: Okay.
25 So you think one year is too short.

1 CEC STAFF BUELL: That's my feeling.
2 I'm sure that if I talked to other people on
3 staff, they have -- believe that one year is the
4 appropriate value to be using.

5 ASSOCIATE COMMISSIONER PERNELL: Okay.

6 CEC STAFF BUELL: There are arguments to
7 be made on both sides.

8 ASSOCIATE COMMISSIONER PERNELL: And
9 that's fine, I mean, again, that's fine. I'm not
10 arguing the point.

11 Just a couple of other points, and that
12 is in the proposed changes, what is the very
13 maximum if the applicant uses all of its
14 extensions and we grant them, what is the very
15 maximum which they would have to commence
16 operation?

17 CEC STAFF BUELL: There would be three
18 years to commence construction, and two years
19 after that would be five years to bring the
20 project on line. You may request an extension
21 for, to bring the project on line in part C, and
22 there is no limitation on how long that could be.
23 And that's a potential oversight in the
24 regulations. We might want to, again, add a one-
25 year clause for the start of operation.

1 STAFF COUNSEL DE CARLO: As written now,
2 it just gives the Commission flexibility in
3 determining what they want that ultimate deadline
4 to be for operation.

5 ASSOCIATE COMMISSIONER PERNELL: Right,
6 but the Commissioners are very -- Scratch that.

7 Normally, we are sympathetic and try and
8 make a realistic decision when people come in to
9 us for extensions, unless they are just really off
10 the wall. I mean, most of the time, at least in
11 my experience, they get some consideration. So we
12 can assume that if someone wanted to request the
13 various extensions, and this is hypothetical, but
14 if they got those extensions they requested, you
15 know, we're back to -- and I keep getting to this,
16 because we're back to the original time line,
17 almost, or something beyond that.

18 So I would just like us to, and
19 obviously we're going to hear from the industry,
20 but I want us to take a real close look at whether
21 we're actually making progress in this in terms of
22 time.

23 CEC STAFF BUELL: And my only reply to
24 that is simply to say that we end up with a five-
25 year window, but it's for the commencement of

1 operation versus the commencement of construction.

2 And I think that's a significant difference.

3 Yes, I understand your concerns about
4 bringing needed facilities on line in a timely
5 manner, and I think that's something that we're
6 struggling with here in this section.

7 ASSOCIATE COMMISSIONER PERNELL: Well,
8 I'm also concerned about people pouring
9 foundations and walking away, and that has
10 happened. So, you know, some of this is not just
11 my brilliant idea, some of this is actually
12 happening in the marketplace.

13 CEC STAFF BUELL: Yes.

14 ASSOCIATE COMMISSIONER PERNELL: Thank
15 you, Mr. Chairman.

16 PRESIDING COMMISSIONER LAURIE: A
17 question, Mr. Buell: I thought I heard you say
18 it's two plus two. It's not two plus two, it's
19 two plus one, for the purposes of commencing
20 construction.

21 CEC STAFF BUELL: That's correct.

22 PRESIDING COMMISSIONER LAURIE: Okay.
23 In looking at the language of subsection B, the
24 verbiage is the Commission may order, meaning it's
25 discretionary.

1 CEC STAFF BUELL: Right.

2 PRESIDING COMMISSIONER LAURIE:

3 Ms. De Carlo, the decision to not approve a
4 request, is it clear in your mind that that is
5 solely in the discretion of the Commission? Must
6 findings be made and must it be based on
7 substantial evidence in the record, or is it a
8 legislative-type decision that is solely in the
9 discretion of the Commission?

10 So, for example, if the Commission
11 determines that there really are no market cause,
12 even if it finds other good causes, it has the
13 discretion to not extend; is that how you would
14 interpret the language?

15 STAFF COUNSEL DE CARLO: Yes, it's fully
16 discretionary for the Commission to decide not to
17 grant an extension, regardless of the reason, I
18 believe.

19 PRESIDING COMMISSIONER LAURIE: So there
20 is a risk of the applicant in going through, in
21 reliance upon going through this process, because
22 regardless of whether good cause may or may not
23 exist, you still need three votes in order to
24 grant that extension, and you don't have to
25 explain the reason for your vote.

1 STAFF COUNSEL DE CARLO: Correct.

2 PRESIDING COMMISSIONER LAURIE: Okay.

3 And under subsection C, my understanding
4 and Mr. Buell's explanation is that currently
5 there is no deadline for actual operation, but
6 that could be part of the Commission's order if it
7 chose to do so, under the current language of "may
8 order." Or does clarification need to be --

9 CEC STAFF BUELL: I certainly think that
10 we could clarify the regulations, but the way I
11 would read it and Lisa can confirm this, is that
12 you may set an order for one month, two months, a
13 year would be in the discretion of the Commission.

14 PRESIDING COMMISSIONER LAURIE: Okay.

15 One last point: When you look at --

16 ASSOCIATE COMMISSIONER PERNELL: Or five
17 years.

18 PRESIDING COMMISSIONER LAURIE: Or five
19 years.

20 When you look at the Subdivision Map
21 Act, and it had verbiage similar to this, I think
22 maybe it's 90 days or maybe it's even 30 days, or
23 maybe it's any time prior to the deadline for your
24 original tentative map, you can file for an
25 extension. And that request for extension tools

1 the time period so that if your hearing is not
2 held until after the deadline, then your permit
3 has not expired.

4 We don't have anything in here that
5 talks about the necessity of holding a public
6 hearing within a very specified period of time,
7 and what happens if the two years expires between
8 the time you file for your extension and a
9 hearing, if it's your intent that a public hearing
10 is required be held. And I would simply ask you
11 to consider that and determine whether you need
12 additional clarification on that point.

13 STAFF COUNSEL DE CARLO: And our intent
14 in providing that the application should be filed,
15 application for extension within 90 days prior to
16 expiration, was so that all of the procedural
17 aspects of hearing the petition could be completed
18 prior to the expiration.

19 PRESIDING COMMISSIONER LAURIE: Okay,
20 but this doesn't require --

21 STAFF COUNSEL DE CARLO: Right, and we
22 can try to clarify that.

23 PRESIDING COMMISSIONER LAURIE: -- so
24 that, for example, if I take my annual four-month
25 vacation in Tahiti during this time period and I

1 make a request that this matter not be heard until
2 I get back, then it's not there. So maybe what we
3 need is some like a next-business-meeting kind of
4 deal.

5 STAFF COUNSEL DE CARLO: Mm-hmm.

6 PRESIDING COMMISSIONER LAURIE: Or
7 something like that.

8 Okay. Commissioner Pernell, any more
9 questions?

10 ASSOCIATE COMMISSIONER PERNELL: Yes.
11 On that point, we're not -- are we required to
12 have a public hearing if there is a request for an
13 extension? I thought I heard you say we're not.

14 STAFF COUNSEL DE CARLO: It's not
15 specifically set forth in this, but I would
16 imagine, pursuant to our other requirements under
17 the Warren-Alquist Act, we would -- a hearing
18 would be warranted.

19 PRESIDING COMMISSIONER LAURIE: So
20 absent that, it would have to be up to somebody to
21 reject it, I guess, before it gets to the
22 Commission. And I don't -- it doesn't sound like
23 that's anybody's intent.

24 So I think, from what I understand, your
25 intention is an application comes in, staff does

1 the background on it and submits a staff report
2 and the Commission holds a hearing on it.

3 STAFF COUNSEL DE CARLO: Yes, correct.

4 ASSOCIATE COMMISSIONER PERNELL: Is that
5 the way it happens now? That's not --

6 CEC STAFF BUELL: Well, Chris, you cited
7 one example. Do you recall that example, what the
8 process was? Or are there other sections of the
9 regulations that govern how the commission should
10 proceed?

11 CEC STAFF TOOKER: I think in that
12 example there was an early staff consultation with
13 the applicant, quite a long dialogue actually in
14 negotiation, and it ultimately went to the full
15 Commission for decision.

16 ASSOCIATE COMMISSIONER PERNELL: See, my
17 thought was that on the extension request or
18 change of project, that it comes to the committee
19 and the committee makes a recommendation to the
20 full Commission.

21 CEC STAFF TOOKER: Well, in this case it
22 was a license that was issued five years prior,
23 and so there was no committee. And so the item
24 was, I believe, referred directly to the full
25 Commission.

1 ASSOCIATE COMMISSIONER PERNELL: I think
2 this would increase substantially the risk if we,
3 if an applicant comes in 90 days prior to the two
4 years and says can I get, I'd like an extension
5 for this and this, and then we open up the whole
6 process to public comment again. I'm not sure
7 that that's --

8 CEC STAFF BUELL: I think that you've
9 raised some good points here, both Commissioners,
10 and one of the things that occurs to me is that by
11 calling this an amendment to the license for
12 application, we could use the existing procedures
13 to process an amendment, conduct hearings. And
14 that clarification needs to be made.

15 Regarding your last point, Commissioner
16 Pernell, I think that that's exactly what this
17 process does. It does open the project up to
18 reconsideration by the Commission, if there are
19 changes in the baseline facts that have occurred
20 since a project was originally licensed. And the
21 most obvious one that will probably be causing
22 some heartburn on the applicant's part is that
23 BACT or best available control technology may have
24 changed.

25 PRESIDING COMMISSIONER LAURIE: You

1 know, Rick, I don't have a problem with that. I
2 mean, it's a business decision to build or not
3 build. And it is a risk to not build and still
4 retain the value of your license.

5 CEC STAFF BUELL: Right.

6 PRESIDING COMMISSIONER LAURIE: And it's
7 more comforting if you have more time to consider
8 that, but that is -- it's always a business issue:
9 Do you build, do you not build.

10 So it has always been my experience that
11 if one of my developer clients chooses not to
12 proceed with their map and seek an extension, is
13 it heartburn time? Absolutely. Absolutely
14 heartburn time. Because you could get turned
15 down, in which case you have a real problem, or
16 who knows what these idiots might do? They might
17 put some conditions on your project that you had
18 not earlier anticipated, or the public might come
19 in, so you really don't want to do that.

20 And you're weighing that against market
21 conditions.

22 CEC STAFF BUELL: That's correct.

23 PRESIDING COMMISSIONER LAURIE: Part of
24 the deal.

25 CEC STAFF BUELL: Yeah.

1 STAFF COUNSEL DE CARLO: If I can add
2 something about the public hearing issue, Section
3 25534 of the Warren-Alquist Act sets forth a
4 procedure for considering amendments or revocation
5 of certification, and it does specify that a
6 public hearing shall be held, and it addresses a
7 violation of the division siting section.

8 PRESIDING COMMISSIONER LAURIE: Well,
9 you can just put something in here indicating
10 hearing will be held pursuant to the procedures
11 set forth in whatever.

12 STAFF COUNSEL DE CARLO: Right, we can
13 do that as well, and include the time frame that
14 it must occur in at the same time.

15 PRESIDING COMMISSIONER LAURIE: And that
16 would allow committee consideration and allow the
17 committee to make recommendations.

18 Okay. Commissioner Pernell?

19 ASSOCIATE COMMISSIONER PERNELL: I don't
20 have anything else.

21 PRESIDING COMMISSIONER LAURIE: Okay.
22 Let's go back to the first item and seek public
23 input on the proposed amendment to Sections 1230
24 et seq. Anybody in the audience desire to comment
25 on 1230 et seq., which provides for a more

1 informal process to the hearing of complaints?

2 Mr. Kelly, good morning.

3 MR. KELLY: Thank you, Commissioner.

4 Steven Kelly with the Independent Energy Producers
5 Association.

6 Regarding the Section 1230.5 dealing
7 with informal complaints, I think I understand the
8 intent here, which is to create a procedure to
9 address complaints as they come to you prior to
10 getting to a formal complaint procedure. But I
11 have a concern or uncertainty as to what impact
12 this is going to have on proceeding in an
13 expedited or timely manner on the actual
14 proceeding.

15 I mean, as I read this, you've got 60
16 days to address an informal complaint. I'm
17 presuming that there are probably some place in
18 your regulations that requires or allows for
19 appeals of a decision, which in my mind suggests
20 that there may be another 30 days that might be
21 associated with these informal complaints.

22 So I would just like to, at this point,
23 better understand what your thinking is and how
24 you planned for this to unfold within the
25 procedures that you're already working.

1 PRESIDING COMMISSIONER LAURIE: Well,
2 let me offer my understanding of what the intent
3 is and see where we go from there.

4 I think the incentive for the
5 modification is right now, if you file a complaint
6 against one of Mr. Harris's projects, our
7 regulations require that we hold a formal hearing,
8 whether staff has done an investigation, whether
9 we think there's any validity to your complaint or
10 not, we have to go through that process.

11 So the intent is to allow a procedure
12 that will allow you to file your complaint, and
13 staff is going to review your complaint. And then
14 if they think it has any validity, some action
15 will be taken on it.

16 Mr. Harris, as the project owner, may or
17 may not know that you have filed a complaint, but
18 I don't know why the filing of the complaint, with
19 just an investigation pending, would affect his
20 operation.

21 MR. KELLY: Well, in my mind in these
22 siting cases, I mean, they often are fairly
23 litigious, and as I understand this informal
24 complaint procedure, it results in a decision that
25 can still be appealed in a formal complaint.

1 So I would envision that anybody that
2 files an informal complaint will spin out the
3 process and then file a formal complaint. So it's
4 not clear to me what you're gaining in that.

5 PRESIDING COMMISSIONER LAURIE: No, I
6 don't think it's you then file a formal complaint,
7 I think it's the manner in which the Commission
8 determines whether there's any validity to your
9 initial complaint, so that if following staff
10 investigation, and I really need correction if I'm
11 reading this wrong, if following staff
12 investigation it determines that there is some
13 degree of validity, it will then recommend
14 initiation of a more formal process.

15 If staff determines that or recommends
16 against a finding of any validity and the
17 Commission concurs with that, then nothing
18 happens. And you probably have no remedy after
19 that point.

20 MR. KELLY: I read under section C,
21 though, that if I don't agree with the results of
22 the review that I can still file a formal
23 complaint, whether I'm -- if I'm the complainant.
24 So what I see here happening is potentially 90
25 days of informal complaint process spinning out,

1 and then somebody will still file a formal
2 complaint.

3 PRESIDING COMMISSIONER LAURIE: Yeah,
4 okay. Well, good point.

5 CEC STAFF BUELL: Can I add a response
6 to that briefly, is that one of the proposed
7 changes we're making to the subsequent sections is
8 in 1232(a)(1), which also allows the Commission to
9 dismiss a formal complaint for lack of merit. And
10 simply if the Commission or the, I believe the
11 General Counsel makes a determination after
12 reviewing the staff's report that the complaint
13 has no merit, this is another out, so that
14 although a complainant may want to try to game the
15 system and stretch it out as long as possible, I
16 view this revised process as giving an out so that
17 we don't end up in the formal proceeding.

18 STAFF COUNSEL DE CARLO: And the
19 informal process is limited to the 60 days. There
20 is no appeal of that except but to file a formal
21 complaint, so it just adds 60 days to it.

22 PRESIDING COMMISSIONER LAURIE: Well,
23 but what I --

24 MR. KELLY: But it results in a decision
25 that is probably going to be appealable.

1 PRESIDING COMMISSIONER LAURIE: What I
2 was anticipating that we were doing was replacing
3 the formal complaint process with an informal
4 complaint process so that -- and I don't even like
5 the term informal or formal complaint. A
6 complaint is a complaint. It's a formal or
7 informal investigation.

8 So that I think what should happen is,
9 if I think there is a violation, I file a
10 complaint, and you investigate the complaint. And
11 staff either says yeah, we think there is a
12 problem here and then recommends that something be
13 done, or staff thinks that there is not a problem
14 and recommend nothing be done. And then
15 ultimately it's up to the Commission, based upon
16 staff's recommendation.

17 So I think that the idea of a formal or
18 informal complaint is not getting at what I'm
19 really looking for. I'm looking for an informal
20 investigative procedure leading to an ultimate
21 decision. You should only have to file one
22 complaint, and then based upon our investigation
23 and our determination, that's the end of it.

24 And so I would like to give that
25 additional consideration.

1 MR. KELLY: Yeah, that would be, my
2 experience watching these, and I watch them from
3 afar, is that the complainants are primarily
4 interested in delay. And they may have legitimate
5 policy reasons or whatever, but delay serves a
6 purpose, because you can mobilize whatever
7 resources in that delay to effectuate your
8 outcome.

9 This, the way it's drafted currently,
10 seems to suggest another opportunity for further
11 delaying a project.

12 PRESIDING COMMISSIONER LAURIE: Okay.

13 STAFF COUNSEL DE CARLO: But does the
14 filing of the complaint itself automatically delay
15 the project? That's not my understanding.

16 PRESIDING COMMISSIONER LAURIE: Well,
17 depending upon the nature of the complaint it
18 could, if a financing entity especially looked at
19 the nature of the complaint, and if the complaint
20 is valid, it could be deemed fatal.

21 MR. KELLY: Yeah, the uncertainty here
22 is --

23 PRESIDING COMMISSIONER LAURIE: Okay.

24 Thank you, Steven.

25 Anybody else?

1 ASSOCIATE COMMISSIONER PERNELL: I would
2 also agree with Commissioner Laurie on this and
3 ask that we take another look at the language and
4 be real clear on the intent.

5 PRESIDING COMMISSIONER LAURIE: So what
6 I think we're looking for, and Commissioner
7 Pernell, let me know if this is consistent with
8 your thought, if I'm a citizen and I find or I
9 want to allege a violation of conditions, I file a
10 complaint.

11 And then that complaint is reviewed by
12 staff and staff makes a recommendation probably to
13 the licensing committee, and the licensing
14 committee can then either determine that a formal
15 process, that the complaint has a degree of
16 validity and that a formal investigative process
17 should go forward or not, and if it determines no,
18 then no action is taken.

19 And I suppose the complainant's next
20 remedy is with some court, but I question even
21 whether the court would have much to say about it.
22 The court would have to attack our decision not to
23 find a violation, and that would be a really tough
24 thing for the court to decide.

25 CEC STAFF TOOKER: And they would look

1 primarily, I assume, at process.

2 PRESIDING COMMISSIONER LAURIE: Yes.

3 CEC STAFF TOOKER: Not at the record.

4 PRESIDING COMMISSIONER LAURIE: That's
5 right.

6 CEC STAFF TOOKER: Right.

7 STAFF COUNSEL DE CARLO: And would you
8 anticipate the decision whether or not to pursue a
9 more formal investigation of the matter, would
10 that take place in a public hearing?

11 PRESIDING COMMISSIONER LAURIE: Not
12 necessarily. Robert, we haven't talked about
13 this, but let's say staff recommends to the
14 committee an action and the committee concurs that
15 there is no validity. Is it necessary that that
16 go to the full Commission for action? I'm not
17 satisfied.

18 ASSOCIATE COMMISSIONER PERNELL: Well,
19 did you say a public hearing or the full
20 Commission?

21 PRESIDING COMMISSIONER LAURIE: Yeah.

22 STAFF COUNSEL DE CARLO: Either, I
23 guess. I was just considering whether or not the
24 complainant would have an opportunity to address
25 the committee in a public-type hearing, whether

1 that be in front of the full Commission --

2 PRESIDING COMMISSIONER LAURIE: Okay.

3 So the decision not to go forward is something
4 that can go to the full Commission person as an
5 opportunity to come forward, and --

6 ASSOCIATE COMMISSIONER PERNELL: To
7 address.

8 PRESIDING COMMISSIONER LAURIE: Yeah.

9 We would consider the action being taken
10 by the full Commission upon the recommendation of
11 the committee, so a complainant then has an
12 opportunity for public comment. That's not a
13 hearing on the complaint.

14 So if the full Commission disagrees with
15 the action of the committee, then the full
16 Commission would order a further investigation and
17 hearing process.

18 CEC STAFF TOOKER: So does that mean
19 that if we pursued this strategy we'd be doing
20 basically the same thing we do with an amendment,
21 where staff reviews it and comes forward to the
22 full Commission with a recommendation through the
23 committee, and the full Commission takes action?

24 PRESIDING COMMISSIONER LAURIE: Yes.

25 CEC STAFF TOOKER: Thank you.

1 ASSOCIATE COMMISSIONER PERNELL: It also
2 gives the complainant two stops, as you will, if
3 you will.

4 PRESIDING COMMISSIONER LAURIE: Right.

5 Okay. Let's go to proposed
6 modifications to Section 1720.3.

7 CEC STAFF TOOKER: I assume there were
8 no other comments from the public on this --

9 PRESIDING COMMISSIONER LAURIE: I don't
10 know. Let's ask: Are there any other comments?

11 Seeing none, we will now go to Section
12 1720.3. Mr. Kelly, good morning.

13 MR. KELLY: Good morning, Commissioners,
14 again. Steven Kelly with the Independent Energy
15 Producers.

16 We have been before you on a number of
17 proceedings related to siting issues and
18 consistently argue that what our industry wants is
19 timeliness and certainty. And the language as
20 drafted so far I don't think provides much more
21 certainty that would facilitate the timely
22 development of projects.

23 And upon reading these lines, I kind of
24 step back and what are we really doing here, and
25 then ask the question why. When I -- At the

1 40,000-foot level, it seems that the major change
2 that is being proposed here is that the Energy
3 Commission would have the opportunity to revoke a
4 plant certification earlier than today; whereas
5 today under five years certificates are revoked,
6 this would allow you to theoretically revoke
7 something after two years, recognizing that there
8 are opportunities to show good cause and appeal
9 and so forth.

10 The question I have is in addition to
11 the uncertainty that's associated with that, this
12 seems to create an automatic revocation process,
13 even in a situation where there might not be
14 anybody who wants to take over the project.

15 As an example, let's say somebody is not
16 able to show good cause of why they delayed.
17 Market conditions went south, all of a sudden
18 everything is imploded, not unlike where we are
19 today, financing is difficult. You've gone
20 through two years of a siting process, very
21 arduous, everybody has got everything together and
22 now you're sitting and waiting for the economic
23 signals to suggest let's go forth.

24 Under this procedure I think you're in a
25 situation where there's some risk that you can

1 revoke, the Energy Commission will revoke the
2 certificate. And then where are you? If you've
3 revoked a certificate and the economic situations
4 change in six months, for example, you're going to
5 have to start the whole process again with a new
6 applicant.

7 And it seems to me that when you do
8 that, you're now waiting another two to three
9 years. You've lost three years rather than gained
10 the timeliness of being able to bring on a project
11 in a timely manner with some certainty under the
12 first situation. It doesn't strike me that this
13 is in the best interest of the state, certainly
14 not in the best interest of the developers.

15 So recognizing that probability, that
16 that's going to occur, I'm a little uncertain why
17 we are moving forward with a procedure,
18 instituting a procedure that would expedite or
19 speed up the relocation of a certification. I'm
20 not sure what is the --

21 PRESIDING COMMISSIONER LAURIE: Yeah.
22 Well, let me, for purposes of the record, seek to
23 respond to that, at least to the extent that I
24 understand it, and I'm sure Commissioner Pernell
25 desires to offer a comment on the question as

1 well.

2 In looking at our responsibility, I
3 think we need to ask what's in the best interests
4 of the developer, only to the extent that such is
5 consistent with what's in the best interest of the
6 people of the state. So I will set aside for a
7 moment what's in the interest of the developer,
8 understanding, however, that sometimes or often
9 what's in the best interest of the developer is in
10 the best interest of the people of the state.

11 But let me put that aside for the
12 moment. So asking the question of how is public
13 policy best served in this question. We know that
14 under the current rules when we grant a license,
15 that license is good for at least five years
16 before you start construction, absent running into
17 problems with the air districts, for example.

18 Well, what has happened during that five
19 years? That entitlement has value, and the owner
20 of that value can do various things with it. It
21 could sell it, it could utilize it to actually
22 create new energy resources, or it could sit on
23 it. If it chooses to sit on it, a couple of
24 things happen. One, it affects the market, but
25 that's the developer's business, that's what the

1 market is all about, and absent some law to the
2 contrary, that's a legitimate business decision.

3 But, in addition, what happens is that
4 that applicant who has that entitlement has gone
5 through this arduous process and has obtained
6 probably water rights, which are limited in the
7 state of California; air credits, which are
8 limited in the state of California; some degree of
9 public support, which is limited in the state of
10 California; some interconnection rights, which are
11 limited in the state of California. And looking
12 at all those other barriers that -- about which we
13 are so familiar.

14 So the value of that entitlement is
15 really multifold. One, there is a market value,
16 but in addition to that, for every megawatt
17 approved it makes the next megawatt more difficult
18 to be approved. And I think all of our
19 experiences are consistent with that. So that if
20 I'm the owner of 1,000-megawatt entitlement and I
21 choose for market purposes not to go today, but
22 you are the potential owner of 500 megawatts and
23 you do want to go today, well, how is the public
24 better served? The public is better served by the
25 addition of that new energy resource into the

1 marketplace.

2 So no public benefit is served from a
3 significant delay in construction, once that
4 entitlement is obtained, because these
5 entitlements, I can't -- the entitlements are
6 finite; that is, they're utilizing a finite number
7 of resources that simply are not available. And
8 the more megawatts that are approved, the more
9 value these entitlements become.

10 So those that currently hold those
11 megawatts, and they're folks that you all
12 represent and I respect that, and there is no
13 illegality or unlawful conduct being conducted,
14 but the question is how is the public best served?
15 The public is clearly best served by putting those
16 megawatts on line, and then when the demand
17 creates an expectation of additional megawatts,
18 then the next folks are free to come forward and
19 go through that process.

20 Now, your point is well raised. If
21 there is a revocation, well, then somebody has to
22 start all over again, I suppose. But there is
23 probably also the presumption that if, at the end
24 of three years or even two years, a market
25 decision or the market is such that nobody is

1 willing to pour concrete, well, then, you know,
2 going through -- then taking that entitlement off
3 the market may be better.

4 So I understand the concern, but clearly
5 from a public benefit perspective, it is better to
6 keep this stuff rolling, rather than put the
7 entitlement in the bank.

8 MR. KELLY: Okay.

9 PRESIDING COMMISSIONER LAURIE:
10 Commissioner Pernell, I probably did not
11 sufficiently articulate your views on the subject.

12 ASSOCIATE COMMISSIONER PERNELL: I think
13 you did quite well, and I would agree with your
14 assessment. I would just add another additional
15 point, which is in your comments you said, you
16 know, the applicant, potential applicant will wait
17 until the economics, until they get the right
18 economic signals, while our analyses tell us that
19 if we don't do anything -- that is, in terms of
20 additional generation in California by the end of
21 '03 or '04 -- all of those economic signals you're
22 talking about will be popping off the chart
23 because we won't have enough electricity. And
24 then everybody will rush to build.

25 History tells me, at least recent

1 history, that there are opportunities to take
2 advantage of market conditions in this situation.
3 And I think California has gone through that. I
4 think what we're trying to do, as Commissioner
5 Laurie has articulated, that we want to be in a
6 position to ensure that the consumer doesn't get
7 gouged while folks are waiting on market
8 conditions.

9 Now, I'm not suggesting that that's what
10 you're saying, but the market conditions for
11 business folks are a little bit different than
12 what the average consumer would, how the average
13 consumer would benefit from that. So I think what
14 we're saying here is -- And the other additional
15 point is the resources that we go through, since
16 there is no charge for this license, the resources
17 that this Commission, or not necessarily us as
18 Commissioners but staff, the time that they put in
19 to do this, we want to be assured that something
20 is going to happen.

21 And we don't want to put any unnecessary
22 risks on the applicant either, but to suggest that
23 you sit around and wait for market conditions for
24 five years I don't think is of benefit to the
25 state and certainly not using resources wisely,

1 because, as Commissioner Laurie has said, there
2 might be someone else who is ready to go today or
3 tomorrow.

4 So I'm sure you've heard enough of us on
5 this.

6 MR. KELLY: Let me -- If I could respond
7 to those points, because --

8 PRESIDING COMMISSIONER LAURIE: Well,
9 Steve, before you do, let me attempt to express
10 what my deepest concern is under the current
11 process. Recognizing that folks are either --
12 cannot build today because the market is chaotic
13 or they choose not to, whatever, it doesn't make
14 any difference to me, my concern is the outcome of
15 that is that there will be an understanding that a
16 shortage of supply will be forthcoming.

17 And there will be people who will say,
18 okay, we're not going to wait for the independents
19 to determine when the right time to go is, we're
20 going to go. And by we, they are meaning either
21 public power or utility power, neither of which I
22 want. I want you guys. That is my preferred
23 method of producing new megawatts.

24 So reality says to me that unless
25 something is done, because we're not sitting here

1 in a cave. Other people are aware of this
2 circumstance. If we don't do something to attempt
3 to resolve this issue, then either there will be
4 legislation that I think might be more harsh and
5 more detrimental to the independent production of
6 megawatts, or, in the alternative, there will be a
7 greater incentive to promote the use of public
8 power or utility power, neither of which is to the
9 benefit of the independent development industry.

10 MR. KELLY: I don't necessarily disagree
11 with what either of you have said, but I do want
12 to explore the themes that you've talked about,
13 and if you can bear with me a little bit.

14 First, there is this notion that if
15 there's somebody there who wants to build and
16 there's somebody in their way, after a certain
17 point in time you ought to get those people out of
18 the way and let somebody go. It presumes that
19 there is a prerequisite, that there is actually
20 somebody who is in line who wants to build at that
21 site and can.

22 And there is nothing in this revocation
23 language that suggests that there is a
24 prerequisite here, that we're going to revoke the
25 license if it can be shown that there is somebody

1 who is willing to build a comparable project or
2 any project at the same place, same time, with all
3 the same benefits or equivalent benefits.

4 So I agree with you, in essence, that
5 from a public policy perspective, if there is
6 1,000-megawatt generator who has gone through the
7 certification and is sitting on it, and somebody
8 comes in with a different kind of facility and can
9 go, well, that's a different circumstance. But
10 that circumstance isn't being addressed in the
11 language that I've seen today.

12 There is another issue about value of
13 the certificates. And when you're siting a new
14 facility, the value of that facility is the Energy
15 Commission certification, the water rights that
16 you've got, the air credits that you've got, all
17 the easements, all the access pieces. That
18 creates the value for the project.

19 Relocating one piece of that implodes
20 the project, certainly, but doesn't bring value to
21 somebody else, who still has to go get all the
22 other pieces. We have a process in California
23 today that says that if somebody wants to buy all
24 the pieces, they can do that, and it happens all
25 the time.

1 What you're talking about is taking one
2 critical piece of a multi-faceted project that has
3 four or five other critical pieces, taking a
4 critical piece, guaranteeing that that project is
5 dead now, but not guaranteeing that there is
6 anything behind it that can go forward, because
7 they can't get the other pieces.

8 And you're actually -- I mean, if you're
9 talking about market power of plant
10 certifications, once you've pulled that or revoked
11 that certificate, they're going to see market
12 power of water, market power of easements, market
13 power of labor contracts. Because somebody has
14 all those pieces together, put them in a package,
15 and brought them to you as a plan.

16 PRESIDING COMMISSIONER LAURIE: That's
17 true, but let -- and, matter of fact, it poses a
18 great question. Let's say I have all of those, I
19 have that package, all of which has value, and in
20 box A are my air credits, and my permit is
21 revoked. So that box of air credits has value,
22 but it only has value if I choose to put it on the
23 market. And those credits then have to compete
24 with other air credits, recognizing that we have a
25 shortage of air credits.

1 So clearly, those credits have value,
2 but importantly, there are some instances which
3 you know credits are simply not available at any
4 price, and that's a disaster for us. Until there
5 is some modification for us of air rules, we have
6 a real problem on our hands.

7 So the capture of those entitlements,
8 whether it's water or air, is only of value to the
9 public if they're utilized for eventually public
10 purpose.

11 MR. KELLY: I agree, but the next guy in
12 line-- I mean, you haven't solved the problem for
13 the next guy in line. For the developer that you
14 just revoked the contract who still holds those
15 rights, the next guy in line may get a new
16 certification from you, but he's still second in
17 line for the next batch of air credits or
18 easements or whatever. You haven't solved that
19 economic problem for him, I don't think. He is
20 still next in line. He is still going to pay
21 slightly more, unless he can do a deal with the
22 guy in front of him, which is the case today.

23 PRESIDING COMMISSIONER LAURIE: Unless
24 he can do a deal with the guy in front of him,
25 right.

1 MR. KELLY: Yeah, and that's the case it
2 is today. So you're not really improving that
3 process, I don't think, nor do I think you can.
4 I'm just pointing out that that is an impediment
5 that you may not be able to fix.

6 The other comment that I have regarding
7 the economic signals that Commissioner Pernell
8 and, Commissioner Laurie, that you both raised, I
9 disagree that we necessarily have to be in a
10 situation where prices are going through the roof
11 before there are economic signals to build. What
12 developers want is some long-term certainty of a
13 revenue stream, which is a contract.

14 You could enter into a contract today,
15 and we've urged people to do this today, for
16 delivery of energy in three years when we think
17 we're going to need it. The problem is, nobody is
18 entering into those contracts. It's not -- And
19 when we design a market system that says all of
20 the developers are going to get all of their money
21 out of this day-ahead market, that is a big
22 problem, and I agree with you. We should not have
23 that kind of system.

24 But the market signals and the economic
25 signals as to when you should develop does not

1 need to come from those signals. It can come from
2 prudent planning, from the Energy Commission, from
3 the load-serving entities that are looking out in
4 the forward markets, looking out ahead and saying
5 demand is going up, I'm going to need some juice
6 here, and I'm going to enter into a contract
7 that's going to incent somebody to build it where
8 I want it.

9 There is nothing in these regs that fix
10 that. That should be happening today, but it's
11 not.

12 ASSOCIATE COMMISSIONER PERNELL: Well,
13 but on that point, I'm not sure you're addressing
14 the right forum to make all of that happen. I
15 mean --

16 MR. KELLY: I understand.

17 ASSOCIATE COMMISSIONER PERNELL: Okay.

18 MR. KELLY: We are in those forums, too.
19 I mean, we are arguing this in many forums, but
20 it's not a reason for saying that private
21 independent power producers can't respond to
22 timely market signals. We do respond to timely
23 market signals. What we need to see from your
24 perspective are different kinds of market signals.

25 We need somebody who is willing to stand

1 up and say I will enter into a contract for
2 delivery of power in two or three years. That's
3 what I want. Start building. Those contracts
4 aren't being -- other than some of the DWR
5 contracts, load-serving entities aren't entering
6 into that. I can't fix that.

7 We're trying to fix that. There is a
8 procurement proceeding at the PUC to deal with
9 that. Hopefully it will get addressed. But that
10 issue that you've raised here is, in my mind, is
11 not a sustainable argument for why independent
12 power shouldn't be responding to market signals.
13 I'm just talking about a different kind of market
14 signal than the day-ahead market or the volatile
15 spot market. There should be some long-term
16 signals there.

17 ASSOCIATE COMMISSIONER PERNELL: Let me
18 ask you a question on that, and maybe I'm not
19 understanding it correctly.

20 If, and I'm assuming people read our
21 forecasts because if our forecasts say that
22 somewhere down the line -- I don't know, two or
23 three years -- California will need additional
24 generation, and you as a businessperson had a
25 license that you didn't have to build until

1 somewhere down the line, do the market signals
2 work to where the price goes up when there is a
3 greater need, or is price constant in terms of
4 market signals?

5 I'm just trying to understand how the
6 market signals work.

7 MR. KELLY: I think for the most part,
8 developers would like -- 100 percent of their
9 output, they'd probably like to sell 80 percent of
10 it on a long-term basis, on a fixed price --

11 ASSOCIATE COMMISSIONER PERNELL: Yeah,
12 but you're talking about long-term contracts, I'm
13 talking about market signals. Do the market
14 signals go up when there is a greater need for the
15 commodity?

16 MR. KELLY: The anticipation of greater
17 need and higher prices should send market signals
18 today. What I'm saying is that if a load-serving
19 entity, a utility were to look at and read your
20 report, and say yes, I agree with the Energy
21 Commission, we're going to have a problem in two
22 and a half years here. Then what I would do as a
23 prudent planner, and representative of the load,
24 is to go to a developer and say listen, I'll enter
25 into a contract with you. I want the power

1 delivered in two and a half years, and there is a
2 penalty if you don't deliver it.

3 PRESIDING COMMISSIONER LAURIE: There is
4 nobody to enter into that contract today; is that
5 right?

6 MR. KELLY: Well, there are a bazillion
7 developers. Anybody in your queue probably hasn't
8 sold all their output.

9 PRESIDING COMMISSIONER LAURIE: No, I
10 mean, there is no purchaser.

11 MR. KELLY: There are no purchasers.
12 There is no load-serving entity who will step up
13 and do that right now -- that's creditworthy.

14 PRESIDING COMMISSIONER LAURIE: Right.

15 MR. KELLY: But we're working on it.

16 ASSOCIATE COMMISSIONER PERNELL: All
17 right. Well --

18 MR. KELLY: But the signals that we
19 respond to, you know, if a utility, for example,
20 were to step up and say I'm looking for power to
21 be delivered here and I want generation here, and
22 here is a penalty clause in the contract that says
23 if you don't deliver it, it's going to cost you a
24 bazillion dollars, they'll get responses to that.
25 And that will incent people to build their

1 projects where it's needed, from the load's
2 perspective, come to you, pattern that project and
3 make it work.

4 ASSOCIATE COMMISSIONER PERNELL: And I
5 understand that concept. My question was strictly
6 with the market signals.

7 And I'm sure you understand that some of
8 those pieces, we're not the proper agency to put
9 those together.

10 MR. KELLY: Yeah, I understand. Right.

11 ASSOCIATE COMMISSIONER PERNELL: All
12 right.

13 MR. KELLY: Okay.

14 ASSOCIATE COMMISSIONER PERNELL: Thank
15 you.

16 MR. KELLY: In my time here, I was kind
17 of looking at 40,000 feet, I would like to address
18 a couple of sub-40,000-foot issues, if I may, in
19 this discussion.

20 ASSOCIATE COMMISSIONER PERNELL: We're
21 coming down to earth.

22 MR. KELLY: I'm coming down to earth.

23 (Laughter.)

24 MR. KELLY: There is, in my mind, if
25 you're going to pursue this path with this kind of

1 regulatory approach, there needs to be a clear
2 definition of some of the key terms, and you all
3 referred to that and I agree with you. In
4 addition to that, there needs to be a clear
5 definition of what good cause is. And I don't
6 know if it's somewhere else in your regulations,
7 it's not here.

8 But prior to even good cause, what we
9 would like to see and what we've argued in other
10 forums, is that there needs to be a recognition,
11 that the clock does not start until administrative
12 and judicial appeals have been exhausted. Because
13 from a developer perspective, you're not really
14 going to -- you're not serious -- you're going to
15 have to wait to see what the outcome is of those
16 administrative and judicial suits.

17 PRESIDING COMMISSIONER LAURIE: Well,
18 that goes to the definition of the effective date
19 of the decision.

20 MR. KELLY: That's correct.

21 PRESIDING COMMISSIONER LAURIE: We have
22 a term "effective date of the decision."

23 MR. KELLY: Right. But those decisions
24 can be appealed.

25 ASSOCIATE COMMISSIONER PERNELL: Right.

1 Now, you know, on that point, and I would just
2 throw out that you can't have it both ways.

3 Now, on a complainant, we're saying and
4 we've discussed and you've commented on that, you
5 know, because -- if a complainant complains that
6 it goes -- it's inside the Commission, we handle
7 it, if there is some validity to it, we move
8 forward, and if there is not, it stops there, but
9 it doesn't stop the project, because we haven't
10 proven that there is some validity to it.

11 But now you're saying over here, the
12 clock doesn't start, nothing starts until you
13 exhaust all of your appeal process, which can run
14 this out way past five years.

15 MR. KELLY: Well, I think -- I don't
16 know that I'm being inconsistent here. On the
17 informal complaint process --

18 ASSOCIATE COMMISSIONER PERNELL: I don't
19 know that you're being inconsistent either, but
20 maybe I'm not understanding you.

21 MR. KELLY: Well, my remarks about the
22 informal complaint process was that you seemed to
23 be creating an additional step.

24 ASSOCIATE COMMISSIONER PERNELL: Right,
25 and you made a point and I think we agreed with it

1 and we're going to go back and look at the
2 language.

3 MR. KELLY: Okay. In this case --

4 ASSOCIATE COMMISSIONER PERNELL: And
5 that was a good point.

6 MR. KELLY: In this case, though, what
7 I'm saying is that a developer will not move
8 quickly to construction if there is a lawsuit out
9 there that threatens the viability of the project.
10 You would be crazy to do that.

11 So your definition of a developer that
12 is, quote, sitting on a certification, that time
13 period for triggering, determining when they are
14 sitting on the certification ought to come when
15 they can actually move forward and start building
16 toward construction without the risk that they
17 would face from an administrative review or court
18 appeal.

19 You need to start the clock after that
20 period, just recognizing that very few developers
21 would prudently move forward and build a project
22 if there is some uncertainty, either
23 administratively or judicially out there, about
24 the viability of the project. You wouldn't invest
25 those monies.

1 And, as we've recognized, the point is
2 to create the milestone at a point where there is
3 going to be some measure that they're committed.
4 And they've already spent four million dollars in
5 the certification process and now they're going to
6 pour cement. I don't think you'll take that step
7 if there is a lawsuit out there against you.

8 ASSOCIATE COMMISSIONER PERNELL: Well,
9 why would there be a lawsuit? I'm not following
10 you on that.

11 MR. KELLY: If you --

12 PRESIDING COMMISSIONER LAURIE:
13 Attacking the approval of the project.

14 MR. KELLY: Yeah. Once you've certified
15 a project, it doesn't necessarily end there.
16 There are a myriad of --

17 ASSOCIATE COMMISSIONER PERNELL: And I
18 think I early on stated that sure, there have been
19 challenges to our certification, but to my
20 understanding, and correct me if I'm wrong, we
21 have counsel here, that none of them have been
22 successful.

23 MR. KELLY: I agree, and we have always
24 argued that your process, though arduous, has been
25 very effective in that regard. But the reality is

1 there is still some uncertainty.

2 ASSOCIATE COMMISSIONER PERNELL: Well,
3 there is always uncertainty.

4 MR. KELLY: Well, yes, but --

5 ASSOCIATE COMMISSIONER PERNELL: You
6 can't do a 100-percent no-risk --

7 MR. KELLY: -- you can't argue that a
8 developer is sitting on a certification willingly,
9 without any intent to build, until you've started
10 the clock at a point where he ought to be
11 building. And I don't think they will be
12 building.

13 I mean, in the history of your
14 certifications, the ones that I'm familiar with --
15 Sutter, where there was an appeal of EPA that took
16 90 days, I think, or 120 days, I don't believe
17 that they were turning dirt during that period.
18 So there are a number of instances where there
19 will be appeals that are going to cause a
20 developer to pause.

21 And my point is simply that the clock
22 should not start until those have been exhausted.

23 ASSOCIATE COMMISSIONER PERNELL: All
24 right.

25 MR. KELLY: And I'll leave it at that

1 and leave it for other people to speak.

2 PRESIDING COMMISSIONER LAURIE: Thank
3 you, Steven.

4 CEC STAFF TOOKER: I'd like to make one
5 comment here. There is language in the current
6 version of SB86XX which speaks to this issue and
7 basically identifies that any actions for
8 revocation would assume not to be taken until
9 after all appeals had been exhausted, that
10 recognizes this problem.

11 PRESIDING COMMISSIONER LAURIE: Right.

12 STAFF COUNSEL DE CARLO: And we did
13 consider including language similar to that in the
14 Subdivision Map Act that would delay the start of
15 this two-year time period until all lawsuits had
16 been resolved; however, we felt that the two-year
17 time period that we'd given for start of
18 construction would be sufficient to accommodate
19 any potential lawsuits, and we haven't really seen
20 that lawsuits have put a stop to construction.

21 Most of the projects we've seen have
22 continued at least with grading while the lawsuits
23 were being resolved.

24 MR. KELLY: It simply raises the risk
25 and the cost of the project.

1 ASSOCIATE COMMISSIONER PERNELL: One
2 final question, when you get done, I'm sorry.

3 MR. KELLY: The other point, what we
4 have articulated in some of the discussions about
5 86XX, because this has been an issue that was
6 raised there, has been that those two attributes,
7 administrative and judicial appeals, we would like
8 to see separate from, quote, good cause. We'd
9 like a formal acknowledgment that we don't have to
10 go to the Commission and argue that this
11 litigation is suing for a decision on good cause,
12 it just is. And that would clarify some of the
13 underbrush and the uncertainty that people have,
14 so I'd recommend that as well.

15 There are some other good-cause
16 conditions perhaps that we should explore. These
17 two clearly are, and they ought to be spelled out
18 as being that.

19 ASSOCIATE COMMISSIONER PERNELL: So
20 you're saying that good cause, we shouldn't deal
21 with the good cause, we just assume that it's good
22 cause and go straight to the court.

23 MR. KELLY: I'm saying that for those
24 two factors, administrative and judicial appeals,
25 those are, per se, good cause.

1 PRESIDING COMMISSIONER LAURIE: As a
2 matter of regulation.

3 MR. KELLY: Yeah, and that it's not a
4 case that I would have to come to the Commission
5 and make the case that it's good cause.

6 PRESIDING COMMISSIONER LAURIE: So that
7 when we are examining the request to extend, and
8 in order to do so we must make a finding of good
9 cause, what you're asking is that if there has
10 been litigation that conclusively determines that
11 good cause exists, and that's your request?

12 MR. KELLY: Yeah.

13 ASSOCIATE COMMISSIONER PERNELL: Are you
14 in support of 86XX?

15 MR. KELLY: Not yet. We're working with
16 the author on that.

17 PRESIDING COMMISSIONER LAURIE:
18 Certainly, 86XX would preempt anything that we
19 might do, and so we're not going to wait for 86XX.
20 The legislature will do whatever it does. You
21 folks, as a matter of strategy, will have to
22 determine whether or not you would rather see a
23 rule in legislation or in regulation.

24 MR. KELLY: Yes, we understand that.

25 PRESIDING COMMISSIONER LAURIE: Okay,

1 thank you.

2 MR. KELLY: And hopefully they can be
3 consistent.

4 ASSOCIATE COMMISSIONER PERNELL: One of
5 them is a lot easier to change than the other.

6 MR. KELLY: I understand that. That's
7 why we're here.

8 ASSOCIATE COMMISSIONER PERNELL: Good
9 morning.

10 MR. HARRIS: Thank you, Commissioners.
11 Thank you for the opportunity to speak. I'm Jeff
12 Harris. I'm here on behalf of Duke today.

13 ASSOCIATE COMMISSIONER PERNELL: On
14 behalf of --

15 MR. HARRIS: Duke Energy.

16 There are many various facets that I
17 want to talk about, but I want to step back to
18 kind of the big picture as well, and try to
19 understand why you all started this, why you
20 started the process, the rulemaking.

21 PRESIDING COMMISSIONER LAURIE: Well,
22 I'm not going to go into that. I just attempted,
23 Jeff, to do the best of my ability to explain; if
24 I was not sufficiently articulate to explain, then
25 I apologize for that. But I'm not going to

1 attempt to answer that question to a greater
2 extent than I already have.

3 MR. HARRIS: Okay. I'm sorry, that was
4 meant to be rhetorical. I wasn't meaning to put
5 you on the spot to provide additional answers.

6 But from our perspective, we've been
7 involved in many different fora on this issue.
8 This is not the only place where the question of
9 how long a license ought to be issued for is going
10 forward. You mentioned the legislature, 86XX.
11 It's a very active process right now, so there has
12 been a lot of thought about how long a license
13 ought to be good for.

14 And, you know, current regulation is
15 five years. And so we've asked the question of
16 other folks as well, why change? What are you
17 trying to solve? What's the problem you're trying
18 to fix, and let me give you a summary of some of
19 the answers that we've heard, and our responses to
20 those.

21 One of the first ones that comes up is
22 the question of public benefit, you know. We have
23 to protect the public. People are out there
24 sitting on a license. Factually, I don't think
25 that's true. Nevertheless --

1 ASSOCIATE COMMISSIONER PERNELL: Do you
2 think people will sit on a license?

3 MR. HARRIS: No, that people are sitting
4 on their licenses.

5 ASSOCIATE COMMISSIONER PERNELL: No, but
6 I'm asking you a question which is a little
7 different, and you're saying you don't think
8 that's true today. But I'm asking you do you
9 think they will sit on a license if this -- if our
10 regs stay the same?

11 MR. HARRIS: There is absolutely --

12 ASSOCIATE COMMISSIONER PERNELL: Waiting
13 on the market signals?

14 MR. HARRIS: No. There is absolutely no
15 money to be made by going through your expensive
16 and arduous process and sitting on the license.

17 PRESIDING COMMISSIONER LAURIE: Now,
18 Mr. Harris, all I can say to that is that maybe
19 the folks you represent are not inclined to think
20 of that, but there have been other folks that have
21 formally met with our people and have discussed
22 the fact that they're waiting for better market
23 conditions, not that financing is not available,
24 but that they're looking at their economic models
25 and they're determining their best time to

1 initiate construction.

2 MR. HARRIS: Is there an injury to the
3 public --

4 PRESIDING COMMISSIONER LAURIE: It
5 doesn't bother me if they do that. It's legal and
6 legitimate, that's what the market is all about.
7 But to suggest that nobody is going to determine
8 the optimum time to initiate construction in a
9 free market just doesn't make any sense to me.

10 MR. HARRIS: Well, let me ask the
11 question, is there a public disbenefit, I guess,
12 for lack of a better term, for people making a
13 decision like that?

14 PRESIDING COMMISSIONER LAURIE: I'm
15 sorry?

16 MR. HARRIS: Is the public -- You talked
17 about public benefit, and I think you're right.
18 Your obligation is to the people of the state of
19 California. The conversations you've described,
20 is there a burden on the state of California, the
21 people of the state of California for that
22 decision not to go forward? I don't see it.

23 ASSOCIATE COMMISSIONER PERNELL: I would
24 say there is.

25 MR. HARRIS: If there is, there is an

1 existing process that the California Power
2 Authority today has the authority to take a
3 license. They have imminent domain power, they
4 have at least three different ways --

5 PRESIDING COMMISSIONER LAURIE: Is that
6 what you want? It is not what I want, Jeff --

7 MR. HARRIS: Not what I want, but
8 that's --

9 PRESIDING COMMISSIONER LAURIE: --
10 that's the point.

11 MR. HARRIS: But if that's the problem
12 people are trying to solve --

13 PRESIDING COMMISSIONER LAURIE: I'd like
14 the Power Authority to go away.

15 MR. HARRIS: Yeah, I'll stand in line
16 with you on that.

17 PRESIDING COMMISSIONER LAURIE: I want
18 them to go away. And I don't want to give them
19 any incentive to enter into this market.

20 MR. HARRIS: Okay.

21 PRESIDING COMMISSIONER LAURIE: And my
22 concern is that we're setting ourselves up to
23 allow them to do that.

24 MR. HARRIS: My point is simply this.
25 If the problem is people are sitting on licenses,

1 the state of California has a remedy. I don't
2 think that's the problem. But I'm pointing out
3 that if you're trying to cure a problem here,
4 there is an existing cure, if that's your belief.
5 And please, sir, I'm not suggesting that's your
6 belief, you've made that very clear.

7 But if the belief of any of the rest of
8 the panel of people pushing this legislation and
9 this particular rulemaking, if the belief is that
10 the people of California need a remedy because
11 people are sitting on licenses, my simple point
12 here, and I'm not advocating it, my point is there
13 is a remedy for that. That's the Power Authority.

14 They have at least three different ways
15 that they can get a license today, including
16 imminent domain, they can come to you with an AFC
17 just like anybody else, or they can go to the
18 private market.

19 And so the illusion, the underpinning of
20 this entire debate in the broader context is that
21 the people in the state of California are being
22 injured somehow, and it's simply not true. And
23 there are remedies if there are those injuries.

24 I realize that's not the reasons you've
25 all articulated, but I wanted to get that out on

1 the table, because that has been a constant theme
2 that we have heard throughout, that somehow people
3 are sitting on licenses and we're helpless as a
4 state. And I tell you, you're not helpless as a
5 state. I spent more time on that point than I
6 wanted to, because I know that's not where you
7 were coming from.

8 Let me move to the second point. The
9 second rationale that we have heard for why we
10 need to do something, why we need to change things
11 is this beat-up development, that somehow people
12 aren't moving fast enough, that there are licensed
13 projects out there that ought to be moving
14 forward, and that they're not.

15 And I think, again, that's a false
16 assumption, and let me go into some specifics on
17 that. First off, the five-year period was put in
18 place to provide some certainty, and it does give
19 you that certainty, it allows time for litigation.
20 And we all know that there will be litigation.

21 As to the point of the trigger, I agree
22 with Mr. Kelly. If you're going to have a
23 trigger, it ought to be final, non-appealable,
24 judicial or administratively. No more appeals.
25 Because when there are appeals pending, that

1 developer is proceeding at risk.

2 ASSOCIATE COMMISSIONER PERNELL: So
3 before --

4 MR. HARRIS: And even if the risk -- I'm
5 sorry -- Even if the risk is small, because your
6 process is great, that developer is still
7 proceeding at risk.

8 Calpine with Metcalf, to use a specific
9 example, is proceeding at risk, because there is a
10 lawsuit. Duke at Moss, proceeding at risk, or
11 was, because of a lawsuit there. That risk may be
12 small, but it's risk nonetheless. And the
13 perversion that I see in this process that you're
14 proposing is that you have a developer out there
15 proceeding at risk, and you're saying you're
16 sitting on a license.

17 And that's why I think you've got
18 absolutely the wrong trigger in this legislation
19 and in this regulation.

20 ASSOCIATE COMMISSIONER PERNELL: Can I
21 ask you a question on this?

22 MR. HARRIS: Please, yes.

23 ASSOCIATE COMMISSIONER PERNELL: And
24 again, I'm not an attorney, but the appeal
25 process, an attorney that certainly knows the law

1 can appeal all the way to the Supreme Court; is
2 that correct?

3 MR. HARRIS: With your process it's
4 first to the Supreme Court, yes, that is right,
5 California Supreme Court for your license.

6 ASSOCIATE COMMISSIONER PERNELL:
7 California Supreme Court?

8 MR. HARRIS: Right, and you are correct,
9 as well; on the federal matters to the US Supreme
10 Court.

11 ASSOCIATE COMMISSIONER PERNELL: And if
12 one of these appeals or one of our license-in-
13 processes had federal jurisdiction, if it was on
14 the coast or even the Federal Clean Air Act, it
15 can go all the way to the Supreme Court; is that
16 correct?

17 MR. HARRIS: Yes.

18 ASSOCIATE COMMISSIONER PERNELL: And so
19 you're suggesting that we -- that the clock
20 doesn't start until that process, theoretically
21 all the way to the Supreme Court and they sit
22 around and decide whether they want to take it
23 after it's there two years or so, that the clock
24 doesn't start.

25 And I'm saying that I think that's a

1 little bit unrealistic, but that's just my
2 opinion.

3 MR. HARRIS: Okay, and the reason -- I
4 respectfully disagree. And the reason that I do
5 is that during that entire pendency of any
6 lawsuit, whether it's a Superior Court action or
7 all the way up to the Supreme Court, there is a
8 risk analysis going on there: How big a risk is
9 this lawsuit? And the developer --

10 PRESIDING COMMISSIONER LAURIE: Jeff,
11 let me ask a question of Lisa.

12 Do you know at the federal level, let's
13 say there is a complete filed with EPA. And the
14 federal agency, after some period of time, rejects
15 the complaint. The complainant chooses to file a
16 court action. Do you know where that's filed? Is
17 it filed in federal district court, appellate
18 court, Supreme Court? Do you know?

19 Arlene, do you know? I'm assuming that
20 if one wants to appeal a decision of a federal
21 agency, you start off in federal district court,
22 as opposed to an appellate court. Does anybody
23 know?

24 ASSISTANT CHIEF COUNSEL ICHIEN: Well,
25 for example, there is an appeal of the

1 Environmental Appeal Board's decision in the
2 Metcalf case, and that appeal is filed in the
3 Ninth Circuit.

4 PRESIDING COMMISSIONER LAURIE: Ninth
5 Circuit?

6 ASSISTANT CHIEF COUNSEL ICHIEN: Yes.

7 PRESIDING COMMISSIONER LAURIE: Okay.

8 ASSOCIATE COMMISSIONER PERNELL: Is that
9 state?

10 PRESIDING COMMISSIONER LAURIE: No,
11 that's federal.

12 ASSISTANT CHIEF COUNSEL ICHIEN: And
13 that's with regard --

14 ASSOCIATE COMMISSIONER PERNELL: That's
15 federal?

16 ASSISTANT CHIEF COUNSEL ICHIEN: I'm
17 sorry.

18 PRESIDING COMMISSIONER LAURIE: That's
19 appeal court. And so the next step after that
20 would be the US Supreme Court. So you don't
21 evidently have to start off at the trial court
22 level in appealing a decision of a federal agency.

23 ASSISTANT CHIEF COUNSEL ICHIEN: Now,
24 that's with respect to the PSD permit.

25 PRESIDING COMMISSIONER LAURIE: Okay,

1 but other rules might be different.

2 ASSISTANT CHIEF COUNSEL ICHIEN: Yes.

3 PRESIDING COMMISSIONER LAURIE: I don't
4 know what other federal actions might be
5 complained against, but at least in this instance
6 you go from the federal -- from US EPA directly to
7 the Ninth Circuit.

8 ASSISTANT CHIEF COUNSEL ICHIEN: That's
9 correct.

10 PRESIDING COMMISSIONER LAURIE: Okay,
11 thank you.

12 ASSOCIATE COMMISSIONER PERNELL: I'm
13 sorry, Mr. Harris.

14 MR. HARRIS: No, that's fine.

15 ASSOCIATE COMMISSIONER PERNELL: I'm
16 just trying to understand.

17 MR. HARRIS: And it is a complicated
18 point that I'm making, and that is essentially
19 that I think you're correct, the risks are
20 generally low because the Commission's decisions
21 are very sound, but that's a risk nonetheless.
22 And a developer who is proceeding in the face of
23 that risk, that's a risk that they're taking.

24 The way I read what you propose so far,
25 that could be construed as not -- sitting on the

1 license, essentially, even though you're
2 proceeding at risk. And I think that's an
3 incorrect result. And that's part of the reason
4 that, you know, these decisions have a shelf life.
5 All these various issues get worked out, and five
6 years is the period that you all pick to allow
7 those things generically to fit any case.

8 And so, you know, Sutter had a PSD
9 appeal. One of the ones on the coast may have a
10 Water Board appeal. There are various different
11 litigations that can go forward, and instead of
12 trying to come up with a rule which relates to
13 foundations, which I think is a federal air issue,
14 the generic rule of having a little certainty, a
15 shelf life of these things makes sense to me, and
16 I don't know why we want to tinker with that.

17 I would also set forth for you that I
18 don't think there is any evidence out there at all
19 that development needs to be speeded up, that
20 somehow this will make people act quickly on their
21 licenses. I don't see any evidence of that at
22 all.

23 We're dealing with a situation where
24 there are a combination of factors here. We've
25 talked about market uncertainty. That is

1 certainly one of the factors that go into people's
2 decision-making process. It's one of the factors
3 that goes into their creditworthiness as well.

4 Similarly, the political environment has
5 a big effect on the ability to go forward, because
6 that political environment has an effect on
7 whether the banks are going to look at you and say
8 it makes sense to me to loan you money or not.

9 And I respectfully submit to you that
10 the things that are going on at the legislature in
11 this debate and this process as well, again
12 respectfully, add to that political uncertainty.
13 And I think that is one of the major concerns that
14 I have about this entire rule-making process is
15 that we're already dealing in a climate that's
16 highly politicized and charged, and this is
17 another bit of uncertainty introduced into that
18 climate.

19 In terms of financing projects, that
20 financing typically occurs post-certification.
21 It's like, you know, you wouldn't borrow money
22 quicker than you needed because you'd have to
23 start paying for the money. I've been involved in
24 financing for probably half a dozen of these major
25 facilities and a couple of the peakers. That

1 always occurs post-certification.

2 And again, it makes sense. If you're
3 going to build a house, you're not going to go out
4 and start making mortgage payments before you have
5 to.

6 ASSOCIATE COMMISSIONER PERNELL: Just --

7 MR. HARRIS: The cloud that I -- Sorry.

8 ASSOCIATE COMMISSIONER PERNELL: Just on
9 that question or on that statement, the financing
10 begins or the financing is secured before the
11 license is issued? Is that what you're saying?

12 MR. HARRIS: No, the opposite.
13 Financing happens after the license is secured,
14 post-certification.

15 ASSOCIATE COMMISSIONER PERNELL: Right,
16 which is what I stated earlier, I thought. Okay.

17 MR. HARRIS: We're in agreement, in
18 other words, yeah. It happens after you have a
19 license in hand. You go out to the banks after
20 that process.

21 So the shelf life of your license is
22 directly affected, has a direct affect on, excuse
23 me, your ability to finance the project. And if I
24 go to the banks and say, you know, I've got a
25 license for two years, they're going to say, well,

1 what happens at the end of two years? Then I'll
2 say, well, there is this process and I've got to
3 show good cause. And they're going to look at me
4 kind of funny. You know, what is good cause? Who
5 gets to decide?

6 You know, I think Commissioner Laurie is
7 correct in this, the words may I think put a cloud
8 over this in the sense that it sounds like the
9 Commission could still not extend the license even
10 with a finding of good cause. And I frankly find
11 "good cause" to be one of the most ethereal
12 concepts in the law. You know, I've done the
13 Westlaw search, I've done the data request, and
14 you're not going to find a good definition of good
15 cause.

16 So for you to sit down and write an
17 opinion to a bank and say here is what constitutes
18 good cause, so don't worry about, you know, the
19 license being no good --

20 PRESIDING COMMISSIONER LAURIE: It's
21 clear when you go get your financing, you have to
22 indicate you have a two-year license under this
23 proposal, that's clearly understood.

24 MR. HARRIS: It would be less than two
25 years at that point, because based on this, that

1 you've got 90 days of administrative process at
2 the Energy Commission from the day of your
3 decision. You know, you get the decision, then
4 you have a 30-day period for somebody to file for
5 reconsideration, a response within 30 days. I
6 guess you've got a 60-day period after your
7 license. So you're already two months past that.

8 Your federal PSD permit, you've got
9 issues with that as well. You know, I just don't
10 think that trigger is appropriate for that reason.
11 But --

12 ASSOCIATE COMMISSIONER PERNELL: But
13 Jeff, I'm having some -- still having a little
14 difficulty on your financing. After you get
15 certification, you go to a bank, you've got two
16 years to build. The bank is going to want to know
17 that you're -- I mean, don't they set up certain
18 milestones, you don't get paid until you finish a
19 certain amount of construction?

20 So if you tell them or tell me as a
21 banker I've got this certification and I've got
22 five years to build, give me all of the money now,
23 is that what they're going to do?

24 MR. HARRIS: No, the problem is on the
25 front end when you walk in -- You walk in with a

1 package. You go to a bank just like you're going
2 to get a mortgage, and say here is our
3 creditworthiness, here are all of our documents,
4 here are all of our certifications, here are all
5 of our permits. And, oh, by the way, instead of
6 being good for five years, they're good for two
7 years.

8 ASSOCIATE COMMISSIONER PERNELL: No, but
9 you're not going to say that in your package.

10 MR. HARRIS: Well, you have to let them
11 know how good your license is --

12 ASSOCIATE COMMISSIONER PERNELL: Right,
13 as Commissioner Laurie had said, but you're not
14 going to say, oh, by the way, it used to be five,
15 now it's two.

16 MR. HARRIS: Well, they're going to
17 know, believe me. The world is not run by power
18 company lawyers, it's run by banker lawyers. They
19 understand --

20 ASSOCIATE COMMISSIONER PERNELL: Are you
21 in the wrong business?

22 MR. HARRIS: I'm beginning to believe
23 so.

24 (Laughter.)

25 MR. HARRIS: But yeah, they know, and

1 they have an independent engineer who knows the
2 process and he knows what the turbines do. And
3 they've got an independent banker's counsel who
4 are my counterparts and who know this process, and
5 they go to your web site and they pull the
6 documents and they know everything.

7 And I think it would be fundamentally
8 deceptive to suggest your license was good forever
9 when it's not. That's the impact. That's the
10 burden. You're going to walk in there now to the
11 banks and say okay, I've got two years from, you
12 know, three months ago to start this project or
13 else my license is no good.

14 And so they're going to want all kinds
15 of assurances that you're going to get done on
16 time, and, you know, the basic question of what's
17 the cost of money. It's like being a higher-risk
18 mortgage lender. But, you know, if I've got a
19 situation where I go to the mortgage company and I
20 tell them I've got a job for six weeks, trust me,
21 they may trust me but I'm not going to get six
22 percent on my house. It's going to be a lot
23 higher, and I'm going to pay points and I'm going
24 to pay other problems.

25 ASSOCIATE COMMISSIONER PERNELL: And

1 that is that market we were talking about.

2 MR. HARRIS: Those are the marketing
3 impacts of something like this. If you come in
4 with a perishable commodity and you say I might be
5 able to show good cause, I might not be, they may
6 look at you and say I don't want to loan you the
7 money, or I'll loan you the money, but guess what
8 your interest rate is going to be and guess what
9 your points are, and here are the terms and
10 conditions.

11 You put that on top of the market
12 uncertainty that's out there, and people start
13 doing, you know, price curves forth, and it looks
14 very unattractive. And what you've done in that
15 sense is really make a project that's hard to
16 finance a lot harder to finance.

17 In a sense here, I think the cure is
18 worse than the disease. We're going to basically
19 know that, you know, within two years you're dead,
20 as opposed to five. And that has financing
21 problems, it has all kinds of other problems for
22 people going forward.

23 It's also to me really
24 counterintuitive --

25 ASSOCIATE COMMISSIONER PERNELL: But two

1 is better than one.

2 MR. HARRIS: Well, yeah, right, but, you
3 know, one is -- you know, you may as well turn
4 over the world to the Power Authority at that
5 point.

6 It is wholly counterintuitive to me to
7 say that our incentive to get people to build
8 power plants is to take their licenses. And
9 that's what this -- you know, I feel like I've
10 fallen through the looking glass, because that's
11 essentially what this reduces down to.

12 Because as you look at the regulation,
13 at the end of the day, the license is revoked and
14 that's it. End of story. There is no one
15 stepping into that license, they can't do that
16 unless the Power Authority does. There is nothing
17 in this time frame that creates any incentive for
18 people to have a license, and, just as important,
19 there is a public interest in having a bank out
20 there, if you will, for lack of a better term, of
21 people who hold licenses.

22 Because, under this scenario, if you
23 revoke all of the licenses and you suddenly see
24 that market take off, you know, we're talking
25 about two, three years, you know, of preparation

1 and certification, and then 18 months to two years
2 of construction. I think there is a value for the
3 state of California to have people who can go
4 forward when the market shows.

5 Because, and again, this is one of the
6 things I have trouble understanding here, the
7 scenario that you've put together, we create a
8 situation where you revoke licenses three years
9 from now, and four years from now you get the
10 market signals that things ought to go and you get
11 the political certainty that things ought to go,
12 and what do you do? Well, you put together a team
13 and spend 18 months putting together an AFC, and
14 hopefully a year getting the license, and
15 hopefully 18 months to two years to build it.

16 And so there is a public interest out
17 there in having those licenses, and so I guess,
18 you know, I don't see them as a limited commodity
19 in that respect.

20 ASSOCIATE COMMISSIONER PERNELL: Well, I
21 think there's a flaw in your scenario and that is
22 that you're suggesting that no one with a license
23 is going to build. I would submit to you that
24 there are some serious developers out there that
25 are ready to build, turn dirt as soon as they get

1 the okay from the Commission.

2 MR. HARRIS: And I represent a number of
3 those folks, yeah. I know there are people out
4 there who want to do that. This makes that harder
5 for them. I mean, that's really the bottom line.
6 I'm telling you, the folks that I represent who
7 want to be in California, who want to have a
8 license, who want to have a license so they can
9 build project, there is no value in permitting a
10 project that you never intend to go forward on.
11 Absolutely no value.

12 CEC STAFF TOOKER: Could I ask
13 Mr. Harris a question?

14 PRESIDING COMMISSIONER LAURIE: Yes.

15 CEC STAFF TOOKER: Jeff, with respect to
16 the issues raised by Commissioner Laurie earlier
17 regarding, let's say, air credits and water
18 rights, under your scenario and with the market as
19 currently structured and our five-year license
20 time line, how do you think those issues are dealt
21 with in terms of recognizing that in an area in
22 the state there may be a critical need for power
23 for reliability purposes. It's just not total
24 number of megawatts, but it's where they are. And
25 that may relate to the availability of offsets or

1 water supply.

2 Under the current system, how do you see
3 those limitations on resources being dealt with
4 equitably to serve the public?

5 MR. HARRIS: I'm not sure I understand
6 your question, Chris.

7 CEC STAFF TOOKER: Well, if, in fact, we
8 agree that emission offset credits are limited in
9 a geographic region, but there is a need for power
10 there to support the transmission grid to provide
11 reliable power, and if you have, let's say,
12 applicants who have obtained certification for
13 projects to be built in that area but choose not
14 to because of market signals, and yet there is an
15 apparent need to improve the reliability of the
16 system through adding generation, there is an
17 inability of others to come forward because of the
18 lack of, let's say, water or air credits.

19 Do you see that as an issue that's
20 significant, or do you think it's something that
21 the market itself will deal with as well?

22 MR. HARRIS: Well, I think there are two
23 answers. Number one, I don't see the markets
24 getting so bad that no one can -- that in theory
25 someone could buy up and hold an asset that

1 prevents someone else from coming in like that. I
2 think the market would correct those things.

3 If I'm sitting there and I have a
4 license that's revoked, and I've got air credits,
5 you know, I'm going to sell them. And I'm going
6 to sell them at whatever the market rate is.

7 CEC STAFF TOOKER: But I'm talking about
8 scenario where you don't revoke the license and
9 where you, in fact, have five years.

10 MR. HARRIS: In that situation, if you
11 have a localized problem like that, you've got a
12 critical reliability facility -- I think that's an
13 important part of your question -- at that point I
14 think there is a public interest in coming in and
15 forcing the party to either sell to the Power
16 Authority or sell to another developer.

17 I think -- You know, again, I go back to
18 the public interest. If the public interest is
19 threatened, the state has currently remedies to
20 deal with that. I don't see those situations
21 developing, Chris. I know there are places where
22 it's hard to get ERCs, for example, but it's not
23 impossible, so I don't see that as a big issue.

24 CEC STAFF TOOKER: Thank you.

25 MR. HARRIS: The basic concern that we

1 have I think in the industry is that we're trying
2 to solve for a problem that doesn't exist, and in
3 doing so we're adding to the political
4 uncertainty, which I think then is also tied up
5 with the market uncertainty.

6 You know, there is legislation pending
7 on this issue. I frankly don't know which forum
8 I'd rather be in. I'd actually -- My preference
9 is that I'd be in neither, because I think that I
10 can click my heels and go back to Kansas too,
11 right?

12 (Laughter.)

13 MR. HARRIS: My preference is that at
14 the end of the day, that whatever comes out, if
15 something has to change, I think change is -- in
16 this case change is bad. I think the status quo
17 is working. I think there are remedies for the
18 hypotheticals that have been posed for when the
19 status quo would not work.

20 And I think at the end of the day what
21 you've done, essentially, is create a situation
22 where it's more difficult for a private company to
23 develop a project in California. Because it's
24 going to be difficult to get a license and get it
25 financed and get it built under this system, much

1 more difficult. And, frankly, again, I don't
2 think the problem exists, and I haven't seen any
3 evidence that you need to speed up these
4 developers.

5 There are a couple of other issues, just
6 briefly. We will provide comments on the legality
7 of the proposed regulations, we have some thoughts
8 on that. I am concerned about the general
9 authorities that are cited. I draw attention
10 specifically to the bottom of page eight, there is
11 a note that talks about authorities cited, 25213,
12 25218(e), and 25541.5 of the Public Resources
13 Code. I didn't bring all those sections with me,
14 but my recollection is those are all very generic
15 sections of your organic statute, the Warren-
16 Alquist Act, that basically say things like you
17 can promulgate regulations, powers of the chair,
18 those kinds of things.

19 I wonder whether there is a close enough
20 nexus between these authorities cited and what you
21 have suggested that you want to do here, and we'll
22 provide some more detailed comments on that.

23 PRESIDING COMMISSIONER LAURIE: Those
24 are the same authorities cited in the adoption of
25 the initial regulations, though. If this isn't

1 valid, then the initial regulation isn't valid
2 either.

3 MR. HARRIS: Well, I haven't
4 challenged --

5 ASSOCIATE COMMISSIONER PERNELL: Well,
6 let's not give him ideas.

7 (Laughter.)

8 MR. HARRIS: I haven't challenged your
9 initial regulation. So I'll just make that
10 observation of those authorities, generically.

11 And secondly, the reason I make that
12 observation is I think those authorities -- What's
13 different about this language now versus what's in
14 the existing regulation is that you're looking at
15 operational issues. You're talking about dates
16 for being on line, you're talking about, you know,
17 various things for operations.

18 And I guess I don't see the operational
19 authority in the Warren-Alquist Act, and I will
20 tell you right now that I need to do additional
21 research on this. I'm not telling you flat-out I
22 think there is a problem, but I think it's an open
23 question in my mind.

24 And the reason that I raise that issue
25 is that if you think back at the recent history of

1 the Commission, the only time you've ever really
2 dealt with an on-line date issue, for example, has
3 been in the peaker setting, under the emergency
4 powers saying you need to be on line by date X per
5 the executive orders. And so the open question
6 for me, and what I want to go do is take a look at
7 your organic statute again, and see whether I
8 think that there is support for that kind of
9 operational change that you're suggesting in this
10 language.

11 Then there is a third kind of a throw-
12 away point as well. You know, I think the fact
13 that there is pending legislation on this matter,
14 you know, raises a question about your existing
15 authorities, and we'll comment on that as well.

16 At the end of the day we're concerned
17 about, you know, not only what you do but also the
18 process here as well. I'm going to end my remarks
19 on the substantive issues.

20 We are, though, very interested in
21 finding out what you envision as the process going
22 forward from this point, because this is -- and
23 I'll be careful not to offend here -- this is an
24 unusual process for the Commission. There are
25 eight pages of regulations and a notice, but there

1 aren't any descriptions of why this is going
2 forward, and I very much appreciate your
3 discussion today, it's been very helpful for us to
4 understand where you're headed, but we're very
5 interested in knowing what you contemplate as the
6 process going forward. Is this our only chance to
7 comment? Is there going to be a more protracted
8 process?

9 And I'll wait for the end to take
10 answers on that question, but we'd definitely like
11 to hear from you as to how you see things
12 proceeding forward.

13 PRESIDING COMMISSIONER LAURIE: Thank
14 you, Mr. Harris.

15 ASSOCIATE COMMISSIONER PERNELL: A
16 couple of questions. 86XX, are you in favor of
17 that?

18 MR. HARRIS: We have submitted a series
19 of amendments, and by we I mean several energy
20 developers and IEP has been involved as well, that
21 would I think aim to make the bill more palatable.

22 It's a situation that where, if it's
23 going to happen -- Well, let me back up. There is
24 a basic strategy question about whether you try to
25 amend a bad bill. You know, one legislative

1 strategy is to not try to fix something that's
2 horribly broken and wrong to begin with. The
3 other strategy is try to make it better.

4 The things that we've done to try to
5 make it better are some of the things Mr. Kelly
6 mentioned; for example, changing the trigger date
7 from the certification date to the date when the
8 permits are no longer appealable, judicially or
9 administratively. That to me is a very
10 significant change.

11 That bill also has provisions that
12 relate to the Power Authority and taking over of
13 licenses that we have a lot of concerns about, so
14 it's a long answer, but I think the answer is we
15 are currently working with the authors, we're
16 hoping it will go away, but if it doesn't, we're
17 hoping we can have something that doesn't make
18 people, doesn't force developers to go away from
19 California. And I think right now as in the last
20 forum is I am concerned about that bill.

21 ASSOCIATE COMMISSIONER PERNELL: All
22 right, and let me just leave you with this comment
23 when you're preparing your comments.

24 As you know, some of these facilities
25 are in communities. And when you start talking

1 about the on-line operation date, it is a blight
2 in the community if you just pour foundations, put
3 up a fence and walk away for five years or however
4 long. So there is a human element to this as
5 well, and I'd just like you to give that some
6 thought, because everything that we do affects
7 somebody in some way.

8 And what we're trying to do is be as
9 balanced and still be productive and help move the
10 state forward. I know that sounds like a
11 political statement, but --

12 MR. HARRIS: I agree.

13 ASSOCIATE COMMISSIONER PERNELL: -- I
14 think it's certainly where I'm coming from on
15 this.

16 MR. HARRIS: I'm not aware of anybody
17 pouring foundations and not proceeding, but it
18 could be, yeah.

19 ASSOCIATE COMMISSIONER PERNELL: Well, I
20 understand that, but I'm just -- this is an
21 example --

22 MR. HARRIS: No, I understand that.

23 ASSOCIATE COMMISSIONER PERNELL: -- of,
24 you know, we're doing hypotheticals here, and so
25 this is an example of what could happen.

1 MR. HARRIS: Yeah. Well, the last
2 foundation I saw poured was at Arco Arena for a
3 baseball stadium that never went forward, but --

4 ASSOCIATE COMMISSIONER PERNELL: And
5 that's still there.

6 MR. HARRIS: -- but not for a power
7 plant, that I'm aware of. But I hear you, I hear
8 you.

9 PRESIDING COMMISSIONER LAURIE: Okay,
10 Mr. Harris. Thank you very much.

11 Mr. Monagan, good morning.

12 MR. MONAGAN: Good morning. Being third
13 in line here, most of everything I was going to
14 talk about has been discussed. So my comments I
15 hope will be brief, and hopefully supplement or
16 complement what Mr. Kelly and Mr. Harris said.

17 PRESIDING COMMISSIONER LAURIE: Do you
18 care to put on the record for whom, if anybody,
19 you are speaking?

20 MR. MONAGAN: For Calpine.

21 PRESIDING COMMISSIONER LAURIE: Thank
22 you.

23 MR. MONAGAN: The easy one is C, which
24 talks about two years from installation of
25 concrete to commercial operation, and the times of

1 18 months to 24 months have been tossed around
2 here a little bit liberally, candidly. I mean,
3 take it from a developer who has finished two
4 facilities, Sutter and Los Medanos, and we're
5 about to finish Delta, and all three of those
6 projects were two years plus in construction,
7 which included overtime, double shifts, and in the
8 facilities that were in Pittsburg, Delta and Los
9 Medanos, required us to import pipe trades and
10 boilermakers from Canada, in an effort to get
11 those facilities on line for summer of '01 and,
12 with respect to Delta, for summer of '02.

13 So, you know, if you talk about two
14 years, I think that's probably not a workable
15 number. It's just not practical.

16 ASSOCIATE COMMISSIONER PERNELL: What is
17 the average time it takes to construct a base
18 plant?

19 MR. MONAGAN: Well, as I was saying, we
20 did it in two years in those three projects, but
21 it required an unusual amount of resources to get
22 it done. Somebody was talking about being in the
23 wrong business. I mean, if you were a member of
24 the pipe trades and boilermakers working ten-hour
25 days six days a week, you were doing pretty well.

1 And importing workers from Canada to
2 supplement the workers that we had here in
3 California was also a very large expense, and
4 whether that changes down the road or not, that
5 we're going to have sufficient people to do the
6 project, I can't tell you. I can't tell you if
7 the Canadian workers will be available a year from
8 now or two years from now, I'm just suggesting
9 that two years from concrete to COD is probably
10 not a workable time frame.

11 ASSOCIATE COMMISSIONER PERNELL: All
12 right, and my understanding of, and I'm not going
13 to argue this point with you, but as you know, I
14 do have some experience in the construction
15 trades.

16 MR. MONAGAN: I've heard that.

17 ASSOCIATE COMMISSIONER PERNELL: More
18 like 23 years, and from 18 to 24 months, unless
19 there are some startup problems or other problems,
20 is a reasonable amount of time to construct a
21 facility. And that's not just some time that I
22 pull out of the air, actually that goes to what
23 some of the developers have said it takes to do
24 that.

25 MR. MONAGAN: I'm not disagreeing that

1 it can't be done in 24 months because I think
2 that's what we start out with is 24 months. As
3 you know, we just went through a very busy period
4 in the construction business here in Northern
5 California where there was a shortage of workers.
6 And, you know, I can't tell you two years from now
7 if that situation is going to --

8 ASSOCIATE COMMISSIONER PERNELL: Well,
9 some of them never went home, let me just --

10 MR. MONAGAN: Yes, right.

11 (Laughter.)

12 ASSOCIATE COMMISSIONER PERNELL: Hence,
13 they are here.

14 MR. MONAGAN: So, I mean, we can discuss
15 that and I can provide some better information to
16 that point.

17 ASSOCIATE COMMISSIONER PERNELL: Can I
18 offer some, and maybe this is -- and I don't know
19 that it's built in, but in terms -- it sounds like
20 you're saying that you don't have much wiggle room
21 in terms of constructing the facility in two
22 years. And there is a -- and I don't know that
23 it's in our regulations, but certainly there is a
24 clause that talks about the, I think it's the term
25 acts of God or something, so if it's storming or

1 raining or flooding or -- then that doesn't
2 contribute to your time.

3 Would that be something that's worth
4 considering?

5 MR. MONAGAN: Oh, I think so. I mean,
6 we would look at something like that.

7 ASSOCIATE COMMISSIONER PERNELL: Well,
8 let me ask staff, do we have that in our
9 existing --

10 STAFF COUNSEL DE CARLO: Not to my
11 recollection. I don't know that we have a force
12 majeure statement in our regulations, but I can
13 check on that.

14 ASSOCIATE COMMISSIONER PERNELL: Okay.

15 MR. MONAGAN: Okay. So we can talk
16 about that.

17 SB86XX, and I will respond to your
18 question --

19 ASSOCIATE COMMISSIONER PERNELL: Because
20 you know why it's --

21 MR. MONAGAN: Right. Calpine's position
22 is opposed unless amended, and as Mr. Harris
23 suggested we have drafted substantial amendments
24 to the bill, we have delivered them to Mr. Rosza
25 in Steve Peace's office. He was going to deliver

1 them to the Energy Commission people since they
2 have been involved -- Mr. Therkelson and
3 Mr. Johnson have been at some of the meetings. If
4 they don't have those amendments, I will certainly
5 provide them.

6 ASSOCIATE COMMISSIONER PERNELL: Okay.

7 MR. MONAGAN: And the amendments deal a
8 little bit with what Mr. Harris was talking about:
9 different triggers, some different time lines and
10 a few things like that.

11 When I first met with Mr. Rosza,
12 probably a month ago or six weeks ago, at the very
13 start of his process this year, I suggested to him
14 that maybe he should not do it because I was aware
15 that the Energy Commission was going to go forward
16 with some proposed regulations. I don't know if
17 the Energy Commission has delivered that same
18 message to Senator Peace, but my response from
19 John Rosza was that we're going to go forward.

20 And 86XX was --

21 PRESIDING COMMISSIONER LAURIE: I'm
22 sorry, his response was what?

23 MR. MONAGAN: They're going to go
24 forward, in spite of the fact that you guys were
25 going to proceed.

1 PRESIDING COMMISSIONER LAURIE: Well, in
2 fact, I think, Michael, that they determined to go
3 forward before we determined to go forward. And
4 we determined to go forward in part because they
5 were going forward.

6 MR. MONAGAN: Okay. I may have had that
7 switched, but I did make the pitch to John Rosza
8 that --

9 PRESIDING COMMISSIONER LAURIE: No,
10 there's no reason that you would know that.

11 MR. MONAGAN: Yeah. I did make that
12 pitch to John, that maybe he could back off on 86.

13 The fact that this is in the special
14 session is I guess meaningful on some level, but
15 he also has a bill in the regular session, so if
16 the special session were to be adjourned, he could
17 also go forward with the regular session bill. So
18 at some point, it would be nice to have only one
19 forum to deal with, although I enjoy it here.

20 The choice to build or not to build by a
21 developer who already has a permit is not
22 something that they would take lightly. You know,
23 the decision based on market financing, whatever,
24 if you decide not to build, there are substantial
25 costs that the developer has incurred along the

1 way, ranging in Calpine's projects from a low of
2 maybe \$5 million to upwards of \$25 million that
3 you could never get back, which goes immediately
4 to the bottom line. So it's not something that
5 you can just say, okay, you know, we're not going
6 to build this plant. You know, it's a substantial
7 hit economically.

8 The fourth point, and I said I wasn't
9 going to repeat what Mr. Harris said, but I think
10 this is very important because we have been saying
11 it to the legislature for at least two years now,
12 that the best thing that could happen in
13 California for the development of new power, which
14 is obviously needed, is some stability. And
15 candidly, that argument has fallen on deaf ears
16 with the legislature.

17 Every time a bill is introduced that in
18 some way causes, suggests a change in legislation,
19 a change in how power plants are looked at,
20 whatever, the financial community says, well, you
21 know, the price of financing just went up. And we
22 argue to the client, you know, make sure you tell
23 the bankers that the bill is going to die in
24 committee, it was just, you know, drafted so
25 somebody could get some political capital -- well,

1 they don't care.

2 So what Jeff has suggested and what I'm
3 suggesting is that 86XX, the regulatory changes;
4 political instability which, of course, is the
5 norm these days, I believe, all cause developers
6 and financial people to take a second look.

7 Now, your arguments, Mr. Laurie, on the
8 need to look at this issue and in talking with
9 Mr. Rosza and Mr. Peace, I mean, we certainly
10 concede some of their points, that the Commission
11 spends a lot of money in approving a plant, a
12 certificate. And there is some public benefit to
13 what you're talking about.

14 But the best thing that could happen to
15 Calpine and other people who are thinking of
16 developing in California is a period where there
17 are no changes, where we let this thing work out,
18 where the financial markets are comfortable that
19 the certificate that we get today is going to be
20 five years and not two years. Or, if it's going
21 to be two years, that two years starts at a date
22 that makes sense.

23 Calpine has made a substantial
24 commitment to California, and we've gone through
25 some very difficult periods here within the last

1 year or so, none of our making, just the way of
2 the world. And we're going to continue to move
3 forward on our projects.

4 We have met with your people and talked
5 about each project individually about what we're
6 going to do. And Calpine is the one company --
7 I'm sorry, not the one company, but one company
8 who has said we're going to stay here. And we
9 need you to just sort of lay low, let the
10 regulatory world, hopefully the legislative world
11 just be stable for a while so the financial people
12 can take a look at this stuff and say, okay, we
13 know it's not going to change, we know what this
14 is worth, you know, we can make the commitment.

15 PRESIDING COMMISSIONER LAURIE: Thank
16 you, Michael.

17 ASSOCIATE COMMISSIONER PERNELL: Thank
18 you.

19 PRESIDING COMMISSIONER LAURIE: Does
20 anybody else desire to comment at this point?

21 Commissioner Pernell, do you have any
22 closing arguments -- I'm sorry, closing comments?

23 (Laughter.)

24 ASSOCIATE COMMISSIONER PERNELL: Yeah, I
25 wouldn't call them arguments, but I do want to

1 thank the representatives from the industry. And,
2 you know, my questions were centered more around
3 understanding what your issues are and how it
4 affects you. And it's a given that I don't agree
5 with all of those, but at least I understand them,
6 and I appreciate that.

7 I think what we're trying to do here is
8 not punish someone for sitting on a license, I
9 don't think we've articulated the reason we're
10 here is because people are sitting on licenses, I
11 think what we're trying to do here is, again,
12 strike a balance between the needs of the state
13 and the developing community. And we're not,
14 certainly not in the business, nor do I ever want
15 to be, of trying to run business out of this
16 state. So I'm an advocate for business, because
17 businesses hire workers and workers have families
18 and, you know, communities and we can go down the
19 list.

20 But there is a need to take notice of
21 what's happening as it relates to the Energy
22 Commission and energy in general. I think
23 Commissioner Laurie was correct on looking at our
24 legislative arena and when there was a problem,
25 normally having worked in that arena, there are

1 kind of knee-jerk reactions. And there needs to
2 be some flexibility.

3 And so I think what we're trying to do
4 here, at least from my perspective, is bring some
5 of that flexibility to the forefront, talk about
6 the needs not just of California and not just of
7 the developer, but also of the communities that
8 have to live with these projects as well. And we
9 can't forget them.

10 I think that we will go back as a
11 committee and certainly discuss and take all of
12 your comments into consideration, and come out
13 with something that everyone is not going to like,
14 and I probably won't like it 100 percent, and we
15 can't ever eliminate all of the risk that's
16 involved in this. But we can certainly try, to
17 the extent possible.

18 But I think we will come out with a very
19 thought-out, thorough document, and hopefully it
20 will be to this impossible somewhat level, both
21 recognizing the developers' concerns, our concerns
22 in terms of the state, and, of course, the
23 residents that have to live around these
24 facilities and some of their concerns.

25 And we get a lot of comments, and I know

1 that Mr. Harris has said he hasn't heard of
2 anything, but, you know, we get complaints, a lot
3 of them, all the time. And we're trying to
4 address some of those as well.

5 So this is not anything that we're, in
6 my opinion we're trying to ding the developer or
7 anyone else. Actually, I would argue the
8 opposite, that we're trying to allow more
9 flexibility and understand what it takes to have a
10 process that allows the state to move forward,
11 developers to move forward, and the community
12 concerns to be addressed. Thank you.

13 PRESIDING COMMISSIONER LAURIE: Thank
14 you.

15 A question was posed as to the process.
16 This discussion and the results thereof will be
17 discussed at the committee level. If the
18 committee develops an agreement as to moving the
19 matter forward under stipulated language, then a
20 proposed, and Lisa or gentlemen, if I don't have
21 this correct according to the administrative law
22 procedures, let me know, but I would expect that
23 if there is an agreement as to language, the
24 recommended language will come forward to the
25 Commission for a Commission public hearing, and

1 adoption. And then it goes to the Office of
2 Administrative Hearings and all that.

3 If the committee does not reach
4 agreement, well, any member of the committee as an
5 individual Commissioner can bring any action that
6 they want to the full Commission at any time. It
7 would be without committee consent, but any
8 Commissioner has the authority to do that. And I
9 have no idea at this point what the end result
10 might be; however, Commissioner Pernell and I will
11 have good-faith discussions on it in committee
12 setting.

13 I deeply respect the issues that have
14 been discussed today. I disagree with the
15 assertion that a problem does not exist. I think
16 a problem does exist. I believe that the public
17 is not served by the banking of entitlement. I do
18 hear the argument that it's nice to have the bank
19 available when the need is there, but that is
20 balanced off by the monopolization of those finite
21 resources that go into the entitlement process.

22 So I believe it's in the public's
23 interest to proceed in a timely and reasonable
24 manner for the construction of the entitlements
25 which we have granted.

1 The argument is made regarding
2 regulatory uncertainty, and I've got to tell you
3 that that is an argument near and dear to me. I
4 believe we have gross regulatory uncertainty in
5 the state of California today, and I believe that
6 to be the main inhibiting factor behind an ability
7 to obtain financing. The primary issue is what is
8 the energy policy of the state of California
9 today, and I'm not sure that any of us sitting in
10 the room can answer that.

11 I also believe that adding to regulatory
12 uncertainty is not a good thing at this point, and
13 that is of great concern to me. And I have to
14 examine in my own mind how this balances off my
15 sense that we do have a problem that needs a
16 remedy. My view in that regard may be a minority
17 view on the Commission. But that is an argument
18 that I understand and I respect and I am gravely
19 concerned about.

20 So we will take those thoughts and
21 discuss it at the committee level. And there will
22 either be a modified version of 1720.3 come out
23 with committee consent, or perhaps one without
24 committee consent. In either case, we'll watch
25 86XX carefully. Certainly, that will preempt. It

1 is hoped that we would provide, if there is a
2 decision to go forward, that we would provide a
3 remedy that offers greater flexibility and greater
4 serves the overall public.

5 And I can't tell you what the timing of
6 any of that is; that is, we have not set a strict
7 time schedule for ourselves.

8 Okay. Staff have any closing comments?

9 Seeing none, we thank you very much for
10 your input, it's been valuable, and we'll see you
11 around the water cooler.

12 ASSOCIATE COMMISSIONER PERNELL: Thank
13 you.

14 (Thereupon, the workshop was
15 adjourned at 11:15 a.m.)

16 --oOo--

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19 *****

CERTIFICATE OF REPORTER

I, PETER PETTY, an Electronic Reporter,
do hereby certify that I am a disinterested person
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Energy Commission workshop; that it was thereafter
transcribed into typewriting.

I further certify that I am not of
counsel or attorney for any of the parties to said
workshop, nor in any way interested in outcome of
said workshop.

IN WITNESS WHEREOF, I have hereunto set
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